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JOHN F. DAVIS, CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 594

JOHN T. GOJACK,

Petitioner,

—v.—

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

EDWARD J. ENNIS
OSMOND K. FRAENKEL
MELVIN L. WULF
c/o American Civil Liberties Union
156 Fifth Avenue
New York, N. Y. 10010

FRANK J. DONNER
36 West 44th Street
New York, N. Y. 10036

DAVID REIN
711 Fourteenth Street, N.W.
Washington, D. C. 20005

Attorneys for Petitioner

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Opinions Below

The decision of the District Court is not reported; it appears in the record at R. 206-208. The opinion of the Court of Appeals (R. 419-424) is reported at 348 F. 2d 355.

Jurisdiction

The judgment of the Court of Appeals was entered on May 27, 1965 (R. 424). A petition for rehearing was denied on July 23, 1965 (R. 435). On July 30, 1965 the time in which to file a petition for writ of certiorari was extended

to and including September 21, 1965 (R. 436). The petition for writ of certiorari was filed on September 21, 1965 and was granted on December 6, 1965 (R. 437).

Constitutional and Statutory Provisions and Rules Involved

These are reproduced in the Appendix, *infra*.

Questions Presented

1. Was the indictment in this case insufficient because it failed to specify the authority of the subcommittee of the House Committee on Un-American Activities to conduct the investigation into the subject allegedly under inquiry?

2. Was the conviction invalid because there was no proof at the trial that the subcommittee which interrogated petitioner had authority to conduct the investigation into the subject allegedly under inquiry?

3. Was the conviction invalid because there was no proof that the investigation was authorized by a majority of the full Committee as required by Rule I of the Committee's Rules?

4. Was the subcommittee inquiry in this case an unconstitutional exercise of a non-legislative power to expose individuals and organizations to public criticism and reprisals as an end in itself?

5. Was invasion of petitioner's First Amendment rights and his right to privacy justified by the public interest that would have been served had he answered the questions relating to his political beliefs and associations?

6. Whether, in view of the vagueness of the Committee's authorizing statute and the Committee's announced purpose to expose him and the other circumstances of the case, the pertinence of the questions which petitioner declined to answer in a matter under inquiry was "made to appear with undisputable clarity" within the meaning of *Watkins* v. *United States*, 354 U. S. 178, 214-215.

7. Was petitioner clearly and timely apprised whether the grounds for his objections to answering the questions put by the subcommittee were accepted or rejected, as required by *Quinn* v. *United States*, 349 U. S. 155?

8. Whether the statute creating the Committee and defining its power is unconstitutional on its face or as applied in this case in that

(a) it exceeds the legislative power of Congress;

(b) it is too vague and indefinite;

(c) it abridges rights secured by the First Amendment;

(d) it violates the constitutional principle of separation of powers.

9. Whether the entire proceeding resulting in petitioner's conviction is unconstitutional as a Bill of Attainder within the prohibition of Article I, Section 9, Clause 3 of the Constitution.

Statement of the Case

Petitioner was charged in December 1955 in a nine-count indictment with having unlawfully refused to answer nine questions pertinent to the matter under inquiry by a subcommittee of the House Committee on Un-American Activities. 2 U. S. C. 192. This indictment with its six surviving counts was dismissed by the Court on May 21, 1962 together with the indictments in five companion cases on the ground that the indictment in each case failed to specify the matter under inquiry. *Russell* v. *United States*, 369 U. S. 749. The same defect resulted in the dismissal at the same Term of the indictments in *Grumman* v. *United States*, 370 U. S. 288 and *Silber* v. *United States*, 370 U. S. 717.

After reindictment under the contempt statute[1] on a six-count charge, petitioner was convicted and sentenced to a fine of $200.00 and a jail sentence of three months (R. 8). The Court of Appeals affirmed *per curiam*.

The pertinent facts are as follows:[2]

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[1] There were also reindictments in the seven other contempt of Congress cases reversed at the October, 1961 Term. But all the cases were dismissed at the trial (*United States* v. *Russell*, Crim. No. 820-62 (D. C. D. C.) (unreported); *United States* v. *Grumman*, 227 F. Supp. 227 (D. C. D. C.); *United States* v. *Silber*, 227 F. Supp. 227 (D. C. D. C.); *United States* v. *Whitman*, Crim. No. 826-62 (D. C. D. C.) (unreported)) or appellate level (*Shelton* v. *United States*, 327 F. 2d 601 (App. D. C.); *Liveright* v. *United States*, 347 F. 2d 473 (App. D. C.); *Price* v. *United States*, No. 18,374 (App. D. C.) (unreported)). The *Russell*, *Grumman and Silber* cases, like the instant case, involved the House Committee on Un-American Activities. The remaining four cases involved the Internal Security Subcommittee of the Senate Judiciary Committee.

[2] Certain additional facts are discussed in the course of the argument.

A. The Proceedings Before the Committee.

On November 19, 1954, Representative Francis E. Walter announced what the aims of the House Committee on Un-American Activities (hereinafter referred to as the "Committee"), would be when he assumed its chairmanship in January of the next year at the commencement of the 84th Congress (R. 180-181, 176-177, 401-407; G. Exhs. 14-14-A):

> "Rep. Francis E. Walter (D. Pa.) who will take charge in the new Congress of House activities against Communists and their sympathizers, has a new plan for driving Reds out of important industries.
>
> "He said today he plans to hold large public hearings in industrial communities where subversives are known to be operating, and to give known or suspected commies a chance in a full glare of publicity to deny or affirm their connection with a revolutionary conspiracy or to take shelter behind constitutional amendments.
>
> "By this means, he said, active communists will be exposed before their neighbors and fellow workers, 'and I have every confidence that the loyal Americans who work with them will do the rest of the job.'"
>
> • • • • •
>
> "Hearings of a similar nature have been held in local areas, but Rep. Walter wants to make them bigger, with the public being urged as well as invited to attend.
>
> "'We will force these people we know to be Communists to appear by the power of subpoena,' Rep. Walter said, 'and will demonstrate to their fellow workers that they are part of a foreign conspiracy.'"[3]

[3] The Government did not contest the authenticity of this quotation (R. 176-177, 401-405; G. Exhs. 14-14-A).

On February 9, 1955, the Committee held a meeting, the minutes of which record the following action relevant to this case (R. 12, 212-213; G. Exh. 5);

* * * * *

> Mr. Scherer moved that David Mates and John Gojack be subpoenaed to appear before a Subcommittee of the Committee on Internal Security [sic] in open hearing at Fort Wayne, Indiana; and that a Dr. Scharfman be subpoenaed to appear in executive session at Fort Wayne, Indiana. The Chairman then designated Mr. Moulder, Mr. Doyle, and Mr. Scherer as a subcommittee to conduct the hearings in Fort Wayne, Indiana, and set the time at February 21, 1955.

* * * * *

The above quoted decision to subpoena petitioner, then an officer of the United Electrical, Radio and Machine Workers of America (UE) (referred to hereinafter as "the Union"), before a "subcommittee of the Committee on Internal Security," is the first entry in the Committee's records purportedly dealing with the hearing at which petitioner ultimately appeared (R. 132-134). There are no earlier (or later) entries, resolutions or minutes in the Committee's files delegating to the subcommittee above designated (or any other subcommittee of the Committee) authority to conduct a hearing into the subject asserted in the indictment (R. 1) and at the hearing (R. 219) to be under inquiry (R. 206). Not only was there no subject officially delegated to the subcommittee but the files of the Committee contain no record of an authorized investigation by the newly-constituted Committee of which the hearing could be deemed a part (R. 131-134, 206, 88-89; D. Exh. 2). Moreover, the February 9 decision to subpoena

certain named individuals without reference to a duly authorized investigation or hearing probing into a specific legislative subject matter also scheduled the very first Committee interrogation in 1955, following Chairman Walter's announcement of a "new plan" described above, to expose "active Communists" by forcing them "to appear by the power of subpoena."[4]

While the minutes themselves do not reflect the fact that Congressman Scherer's motion to subpoena petitioner was approved, the record shows that on February 9, 1955, the day of the Committee meeting, a newspaper in Fort Wayne, where the hearings were scheduled to be held, printed a story quoting a statement made by the Chairman that petitioner would be called to testify before the Committee in Fort Wayne (R. 94-95, 123-124, 130-131). When the announcement was made, the subpoena had not even been issued: it was issued on February 10 and petitioner was not served until February 15 (R. 127-128).

Because the proceedings might affect the outcome of a National Labor Relations Board election among the employees of the Magnavox Company, scheduled for February 24, in Fort Wayne, many—including petitioner—protested on behalf of the Union (R. 125-127, 227, 229, 372-374). Petitioner's protest also charged that, three days before the public announcement of the hearing, Mr. George McClaren, the labor relations director of the Magnavox Company, whose employees were involved in the election, announced to the employees that petitioner would be subpoenaed (*Ibid.*).

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[4] *See Supplement to Cumulative Index to Publications of the Committee on Un-American Activities*, 1955-1956, 84th Cong., p. 1; *Congressional Investigations of Communism and Subversive Activities*, Summary-Index, 1918-1956, compiled by Senate Committee on Government Operations, 84th Cong., 2d Sess., p. 252.

On February 14, a representative of the Union sought a postponement of the proceedings because of the pendency of the election (R. 115-119). The Chairman insisted that the application be made at an open hearing, called in the press before the application was made (R. 112-115)[6] and announced in the course of a recorded interrogation of the applicant that "all of us are interested in seeing your Union go out of business, because we do not feel it is good for the United States" (R. 116, 120). Additional comments in the same vein were made by Chairman Walter and by Congressman Moulder, the subcommittee Chairman, who was also present (R. 114, 119-122).

On February 15, a Fort Wayne newspaper printed a boldly-headlined story, the accuracy and authenticity of which is unchallenged (R. 85, 401-405; G. Exhs. 14-14-A), "House Un-America (sic) Committee Wants UE 'Out of Business'" (R. 407; D. Exh. 1). The story, under the by-line of a reporter present at the interrogation (R. 111-112), states, "Chairman Francis Walter (D-Pa.) and Rep. Morgan Moulder (D-Mo.), both declared the committee should try to break the hold of the Union on defense plants" (R. 407). Thus an application for adjournment made to protect the Union from the prejudicial impact of the Committee's planned hearing resulted in a further attack on it by the Committee.

On February 18, the hearing was adjourned until February 28 (R. 14-16). On February 22, two days before the election, the Chairman again attacked the Union—this time on the floor of Congress (101 C. R. 1906, 84th Cong. 1st

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[6] The Chairman refused to hear the application because it was not made under oath (R. 115-119).

Sess.). He called for the defeat of the Union in the collective bargaining election, complained that telegrams and letters demanding cancellation of the hearings were subversively inspired[6] and stated that the "postponement was agreed to very reluctantly and only after it was feared that false and malicious charges against the committee by the UE might result in this communist-dominated union continuing as the bargaining agent in this vital defense plant."

On February 23, the Committee discussed the Fort Wayne hearings at a meeting (R. 213-215; G. Exh. 7). The minutes of this meeting, like the minutes of February 9, contain no reference to a proposed subject matter for investigation by the subcommittee but merely record the fact that the hearing had been continued (R. 213-215; G. Exh. 7).

It was conceded at the trial that the minutes of February 9 and 23 constitute all of the Committee's file entries on the subject of the Fort Wayne hearing (R. 131-134, 205-206).[7]

Since the adjourned hearing was transferred to Washington, a second subpoena was issued on February 18 (R. 16). Before the second subpoena was even served, a local newspaper was briefed on its issuance as well as the exposure purpose of the hearing. The *St. Joseph Herald-Press*, a newspaper in St. Joseph, Michigan, where the Union functioned as the collective bargaining agent for the

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[6] The witness who preceded petitioner, Lawrence Cover, was called and interrogated in an effort to establish the tainted origin of the protest against the timing of the hearing and to obtain identification of Union officers who had sent telegrams (R. 227-229).

[7] Rule XI, par. 26 of the Rules of the House of Representatives provides: "(b) Each Committee shall keep a complete record of all committee action. Such record shall include a record of the votes on any question on which a record vote is demanded."

employees of the Whirlpool Company, on February 21 printed a statement of the Committee Chairman, the accuracy of which is uncontested (R. 279), that the hearing would expose petitioner and another subpoenaed witness as "card carrying Communists" and that, "the rest is up to the community" (R. 408; D. Exh. 1). The rescheduled hearing also overshadowed a representation election; as the story noted "the hearing will precede by three days the N. L. R. B. representative election at Whirlpool" and "may have a direct influence" on its outcome. The account also quoted Chairman Walter's statement of the Committee's desire to see the end of the Union which had appeared earlier in the Fort Wayne press (*ibid.*).

At the commencement of the hearing petitioner's counsel filed a motion, to which were appended the newspaper accounts referred to above, objecting to the hearings and moving to vacate subpoenas on the following grounds (R. 220, 405-406):

"1. The Committee is not engaged in a legislative investigation for a *bona fide* legislative purpose. This Committee is limited under Article I, Section 1 of the United States Constitution to the exercise of legislative powers. The Chairman of the Committee has previously announced as is shown by the newspaper clippings attached hereto that the purpose of the hearing is to force the United Electrical, Radio and Machine Workers of America (UE) 'out of business' and that with respect to the movants Gojack and Jacobs 'to bring out the facts that they are card carrying Communists. The rest is up to the community.'

This purpose is not legislative to character and hence is outside the committee's powers.

"2. If the Committee seeks to inquire into activities of a criminal nature, no specific charges have been furnished the movants and no evidence has been offered that they have violated any law.

In any event, the power to inquire into crime is one which is confined exclusively to courts and grand juries under Article I, Section 8 of the Constitution.

"3. The purpose of breaking a union is not one which is authorized by the committee's basic resolution, Public Law 601.

"4. Even if such a purpose were authorized by the committee's basic resolution, the resolution as so construed and applied would constitute a violation of the free speech and assembly guarantees of the First Amendment to the Constitution.

"5. The committee's basic resolution is in any event unconstitutional because no person can determine from it the boundaries of the Committee's power.

"6. The Committee intends, as its Chairman has announced, to exact compulsory disclosures of movants' political beliefs and affiliations. The First Amendment forbids this particularly where as here there is no overriding legislative justification for such inquiry."

The motion was received by the Committee with the comment (R. 220) that "whatever action the Committee desires to take on it, we will take."

After petitioner had declined to answer the questions which gave rise to the indictment, the subcommittee Chairman announced (R. 374-375), that at the time the motion had been filed, "the members of the subcommittee unani-

mously voted to overrule the objections and the motion to vacate the subpenas. Therefore, I want the record to show that at that time, nunc pro tunc, the objections and the motion to vacate subpenas are overruled."

Not only was the action on the motion belatedly communicated to petitioner, but no statement of legislative purpose, particularization of the matter under inquiry, or disavowal of the motion's charges was made when the motion was filed.

Near the close of the testimony of the first witness, the Chairman took note, not of the specific allegations in the motion, but of "newspaper articles" referring to the hearing as an effort by the Committee "to break or bust unions." The Chairman disavowed this general objective but insisted (R. 225) that "it is our intention and purpose to point out to the public, as well as union members, Communist domination or Communist activities in such unions wherever it may exist." He subsequently added that the Committee was "dedicated to expose communistic activities" (R. 230). Congressman Scherer agreed that the Committee's purpose was "to help [unions] relieve themselves of Communist domination" (R. 225; see also R. 283). And Congressman Doyle informed another union witness (R. 384) "that the "Committee's legislative assignment" was "to break up . . . if we can, any Communist Party controls or efforts to control either your union or any other union."

At the commencement of the hearing and before the motion was filed, the subcommittee Chairman announced that the hearing would consider testimony (R. 219) "relating to Communist Party activities within the field of labor, the methods used by the Communist Party to infiltrate labor

organizations, and the dissemination of Communist Party propaganda." The record does not show that petitioner, who was the third witness, was present when the statement was made.[8]

Petitioner was subjected to an unusually comprehensive probe of his life—both public and private. He was asked not only the conventional questions about his politics, but about his employment since 1935 (R. 244-245, 249-255), his discharge from the Army in 1937 (R. 244-248), his draft status in World War II (R. 256-261) and whether he had falsified a claim to a high school education in a questionnaire he had signed fifteen years earlier (R. 345-350).

Petitioner responded to most of the questions put to him by the subcommittee Chairman and members—about five hundred in number—but declined to answer the six questions which gave rise to the indictment, both on First Amendment grounds and on the ground that the purpose of the hearing was an illegal one, exposure (R. 263, 266, 268, 270, 283, 286, 288, 289, 291, 292, 296, 323, 326, 327, 330, 340, 362, 366, 369, 376, 377). In response to one question, the witness protested that (R. 343), "I don't think the law under which this Committee operates was set up for exposure pur-

[8] The Government has pointed to the fact that petitioner objected to certain questions asked of the first witness (R. 274). But that is hardly proof that he heard Congressman Moulder's statement, especially since the questions to which he referred were asked long after hearings commenced (R. 96-98; G. Exh. 12, "Investigation of Communist Activities in the Fort Wayne, Ind. Area", Hearings before the Committee on Un-American Activities, 84th Cong., 1st Sess., p. 40). The Government introduced evidence that petitioner was seen conferring with the first witness prior to the opening of the hearing and that he was not observed leaving the hearing (R. 100-109). But there was no testimony that he was actually present when Congressman Moulder made his initial statement about the scope of the hearing (R. 219).

poses. My understanding is that that is what the courts are for, to expose people." Congressman Scherer, echoing earlier statements by the subcommittee Chairman (*supra*, p. 12) replied (*Ibid.*), "Their job is to judge, not to expose. It is the job of this Committee to expose Communists. That is one of its primary duties, to expose Communists and the nature of the infiltration of the Communist conspiracy in every activity and agency of American life, which includes labor unions."

In answer to questions about whether he was a Communist, petitioner pointed to the fact that beginning in 1949 he had signed affidavits, pursuant to Section 9(h) of the Taft-Hartley Act, that he was neither a member of, nor affiliated with the Communist Party and that he neither believed in, was a member of, nor supported any organization dedicated to the overthrow of the United States Government by force or by any illegal or unconstitutional methods (R. 262-264, 269).

B. Judicial Proceedings.

1. *The District Court.*

Petitioner was reindicted on September 4, 1962 under the contempt statute in a six-count indictment based on refusal to answer the following questions (R. 1-3):

1. Are you now a member of the Communist Party?

2. You have left us under the impression at this point that by reading the newspapers you knew that Johnson was chairman of the Communist Party of Indiana and I am asking you if that is the only way you knew Johnson.

3. Mr. Gojack, did Mr. Elmer Johnson or Mr. Aron appear and address a group of people when you were present?

4. May I ask the witness, do you know whether or not Russell Nixon is a member of the Communist Party?

5. Did you take active part in the peace pilgrimage to Washington which was organized by one of the "front" organizations known as the American Peace Crusade?

6. What method was used to get you as an original sponsor? [That is, original sponsor of the American Peace Crusade.]

Petitioner moved to dismiss the indictment on a number of grounds, including its failure to state facts constituting an offense against the United States. This and other pretrial motions (R. 5-7) were denied (R. 8).

The record is, for the most part, a stipulated replica of the record in the first trial. The Government supplemented the first trial record with documents (G. Exhs. 5 and 7, *supra*) dealing with the Committee's purported authorization of the hearing. Certain materials, excluded from the evidence at the first trial, in support of petitioner's contentions that the hearing was called to expose and injure him and his Union, that exposure had dominated the Committee's activities from its origin and that it is the characteristic mode of the Committee's exercise of jurisdiction, were received in evidence (R. 142-181). The first trial record was further supplemented by expert testimony (R. 181-205) that the individual and public interests safeguarded by the right of free speech and assembly and by the right of privacy outweighed the public interest in securing answers to the questions which gave rise to the indictment.

Frank S. Tavenner, the Committee's Counsel and the Government's principal witness, testified (R. 13) that the

Committee had been investigating Union officials since 1949 and that in 1951 it had heard testimony that the entire Union was saturated with Communists (R. 16-18). He testified further that in July 1953, a witness offered the information that a group of Union organizers (in a District other than petitioner's) were Communists (R. 18-19). No testimony was adduced that the Committee had information that petitioner was a "card carrying Communist," to use Chairman Walter's words, or any other kind of Communist.

Mr. Tavenner further testified (R. 19-22) that in 1947 Aron and Johnson (Indictment, Counts 2 and 3) had been identified as Communists before the Committee. But no testimony was adduced that the Committee had any basis for linking petitioner politically with these individuals. Similar testimony was presented that the individual (Russell Nixon) referred to in Count 4 had been identified as a Communist (R. 26-32). The Government further showed that petitioner—together with other Vice-Presidents of the Union—received a letter from Nixon with an enclosure of a document calling for peace addressed to the Union, from the Metal Workers of Paris (R. 33-40). Finally, the Committee adduced evidence that the American Peace Crusade (Counts 5 and 6) had, in 1951, been cited—by the Committee itself—as a "front organization" (R. 23-24), and that petitioner was one of its sponsors (R. 25-31).

It was stipulated that, for every year prior to the hearing since 1949, petitioner had filed non-Communist affidavits stating under oath the disclaimer referred to above (R. 44-51). Petitioner also introduced evidence that Labor Relations Director McClaren of the Magnavox Company had in 1953 during the period when the Union was the collective bargaining agent for the Company's employees, obtained

from the Committee through his Congressman petitioner's political dossier in the Committee's files (largely mirrored in the hearing) and had circulated it among the Magnavox supervisory employees (R. 134-141; 409-418; D. Exhs. 3, 3-A, 4) with the notation that "If your friends or neighbors would like copies of this report, we will be glad to supply additional copies for them."

The trial court in upholding the indictment against petitioner's claim that it lacked a specification of the subcommittee's authorization to investigate the matter alleged to be under inquiry, ruled (R. 110) that its mandate was adequately spelled out (1) by the fact that the Legislative Reorganization Act and House Resolution 5 (both referred to in the indictment) vest the authority of the full Committee in its subcommittees; (2) by the recital of the authorization to subpoena petitioner and (3) by the identification of the matter under inquiry by Chairman Moulder at the hearing.

It found in the record of the Committee minutes, referred to above, evidence that the full Committee had complied with its Rule I, which requires approval of an investigation by a majority of the Committee (R. 111). It concluded that the hearing had a legislative purpose and that the interest in requiring petitioner to respond to the questions outweighed the interests in free speech and privacy (R. 206-208).

2. *The Court of Appeals.*

The Court of Appeals affirmed the conviction in a *per curiam* opinion (R. 419-424) which specifically rejected some of petitioner's contentions and ignored the rest. The court ruled that there was "one serious question presented by this record" (*infra* p. 126), the failure of the subcom-

mittee to make a timely ruling on the objections which petitioner had urged at the commencement of the hearings. However, the court ruled that it was "not disposed to consider the matter" in view of the fact that it had not been urged as a ground for reversal although it had been referred to in another related connection. The concurring judge found no merit in the majority's reservations. The petition for rehearing squarely raising the issue adverted to by the court below was denied (R. 435).

Summary of Argument

I.

The indictment in this case refers to the matter under inquiry ("Communist Party activities within the field of labor") as announced, in part, by the subcommittee Chairman at the commencement of the hearing. But the indictment nowhere specifies how the subcommittee acquired the authority to conduct the hearing. The sources referred to in the indictment merely refer to the Committee's general jurisdiction, the power of the chairman to appoint subcommittees, the appointment of a subcommittee and an action continuing the hearing.

Both the Committee's charter as well as the practice of Congressional committees to which it is analogous, require that the Committee must proceed by an official delegation of a defined portion of its authority. In addition, the Committee must clearly define the particular subject under inquiry as a prerequisite to the exercise of the power of compulsory disclosure, because of pertinency and due process requirements.

A subcommittee of the Committee has no power to hold hearings without authority for such authorization gives it competence to proceed as well as a legislative purpose *Watkins* v. *United States*, 354 U. S. 178, 207.

The Committee, which characteristically acts through subcommittees, recognizes the importance of a clearly-defined authorization, for it has made it a practice of reciting such authorizations at the commencement of its hearings. And when such an authorization lapses at the end of a term of Congress the Committee adopts a renewing authorization to validate the continuence of an investigation.

The failure of the indictment to specify the subcommittee's authority is thus a fatal lapse. If such authority had been designated petitioner would have been able to litigate at the outset the claim made at the hearing that there was no legislative purpose. In addition if, as the Government now contends, the hearing was authorized at some earlier session of Congress, the indictment would have been subject to attack on the ground that authorization had lapsed and had not been renewed. The cases which have dealt with this issue (*United States* v. *Seeger*, 303 F. 2d 478 (C. A. 2) and *United States* v. *Lamont*, 236 F. 2d 312 (C. A. 2) affirming 18 F. R. D. 37) have squarely held that an indictment which fails to specify a subcommittee's authority is invalid. Moreover, *Russell* v. *United States*, 369 U. S. 749 obviously requires that the indictment enlighten the defendant and the court not merely as to the matter under inquiry as announced at the hearing but also as to the matter confided to the subcommittee in the first place. That this is so is indicated by the decision of the Court in *Barry* v. *United States*, ex rel. *Cunningham*, 279 U. S. 597, 613, as well as by the views of the House itself.

In addition, without a reference in the indictment to the subcommittee's authorization there is no way for a court or a defendant to determine whether in a hearing of limited scope the authority exercised by the subcommittee conforms to the authority delegated to it.

II.

The proof could not, of course, cure the defect in the indictment but in any event there is no proof that the subcommittee which conducted the hearing was, in fact, properly authorized to do so.

III.

A Committee Rule requires that investigations of the kind involved here be activated by a vote of a majority of the members of the Committee. The record in this case affirmatively shows that no such approval was ever given. The conviction therefore cannot stand. *Yellin* v. *United States*, 374 U. S. 109.

IV.

The hearing in this case was an exercise of the unconstitutional power of exposure. We concede that courts must be hospitable to Congressional inquiries, but it is equally true that courts cannot tolerate usurpation of the functions of other branches of Government.

From *Kilbourn* v. *Thompson*, 103 U. S. 168, to *Barenblatt* v. *United States*, 360 U. S. 109, the Court has made it clear that there is no legislative power to investigate the private affairs of private individuals as such. Nor does the Congress or any of its committees possess the power to investigate in order to punish a witness. This is a law-enforcement power confided exclusively to the courts.

The distinctions between legislative power which concerns itself with rule-making and the law-enforcement functions of the Executive and the Judiciary are well established and clearly understood. Congress cannot either on its own or through one of its committees establish a standard of conduct and then apply sanctions to those it finds guilty. The Committee here usurped law-enforcement functions.

In determining whether or not a Congressional committee has departed from its proper functions a court cannot speculate as to the motives of individual committee members. When Congress has enacted legislation which falls within its constitutional competence there is a presumption that its purpose was legislative. Congressional investigations are governed by the same principle but the determination of a legislative subject matter depends on considerations far more varied and informal than are involved in the determination of legislative purpose in the case of a statute. But the difficulty of the task does not diminish the duty of a court to scrutinize the claim of a valid legislative purpose. The very principle of separation of powers which commands the deference of a court to an assertion by the legislature of a proper purpose also requires it to prevent encroachments on other branches of the Government.

The record here, in contrast to cases in which the court has found a legislative purpose, affirmatively establishes proof of exposure. Thus, there can be no presumption of regularity or of legislative purpose because the subcommittee's authority to act was neither pleaded nor proved.

Clearly indicative of the exposure purpose of the hearing was the fact that this was the first hearing conducted pursuant to a new Committee plan to engage in bigger and

better exposure hearings with a view to stimulating community reprisals. The entire record shows how this plan was executed. The Chairman indicated on several occasions that the purpose of the hearing was to expose petitioner to private hostile action against him and to break the Union of which he was a leader. Petitioner was subpoenaed twice —his first hearing was postponed. Special interviews were given to the local press in two different communities before the hearing was scheduled to be held. The Personnel Manager of a plant in which petitioner's Union was faced with an election was able to announce three days before the issuance of the subpoena that a subpoena would be issued. Chairman Walter expressly told a local newspaper that the hearing would demonstrate that petitioner was a "card-carrying Communist" and that "the rest" would be "up to the community." Another newspaper was told that the Committee was interested in breaking petitioner's Union, an objective which was reiterated by the Chairman on the floor of the Congress. The subcommittee which presided over petitioner's hearing was informed of the Chairman's announcements and actions, but did not disavow them. On the contrary, the Chairman of the subcommittee as well as the subcommittee members clearly indicated that the purpose of the hearing was to purge petitioner from leadership in his Union and to injure the Union. The exposure purpose thus revealed in the entire record is emphasized by the fact that the Committee had no evidence to warrant the belief that the petitioner was a "card carrying Communist."

The fact is that the hearing was conducted as part of an enforcement program of a statute invented by the Committee but never passed by Congress against certain proscribed labor organizations. This invented statute is in derogation

of a statute actually passed by Congress six months before the hearing was held (the Communist Control Act of 1950, as amended). Investigations under that Act were confided to the Attorney General who filed a petition against the Union on December 20, 1955, which was ultimately dismissed.

V.

The record in this case must be evaluated in the light of a pattern of exposure which has characterized the Committee's operation from the beginning. The Committee's self-proclaimed purpose has been exposure. The "facts" are already known to the Committee and the investigative inertia is overcome not because of an investigative need for facts, but only because the names of new exposable victims have become known to the Committee. The Committee's exhaustiveness and its continuity demonstrate that it has transformed itself into a law enforcement tribunal.

The extraordinary stress on names explains the Committee's demand of witnesses that they inform on others—even when this demand means a sacrifice of the information which the witness possesses. The hearing is merely a forum in which the witness whose lack of cooperativeness is known in advance is exposed and punished. In order to enhance the punishment the Committee insists on public sessions, where it is easy to stimulate economic, social and political sanctions against the unfriendly witness, to deprive him of his constitutional rights and to isolate him from the protections of his society. This exposure purpose and the importance of inspiring reprisal movements among its supporters explains the Committee's extraordinary use of field

hearings, its collaboration with the press and its lack of legislative output.

In addition to its investigations, the Committee also engages in ancillary non-legislative activities such as a listing of condemned organizations and the circulation of indices, dossiers and propaganda. The harshness of this exposure system has given rise to the practice of "clearing" the repentant and the blacklisted—a wholly non-legislative function.

Thus, petitioner's exposure hearing was the product of a unique exposure tribunal, an autonomous power system whose entire functioning is unified and explained by its purely non-legislative motivations.

This exposure pattern reinforces our contention with respect to the purpose of the hearing and independently condemns Rule XI itself as an unconstitutional usurpation of power.

VI.

If we are correct in our contention that the hearing was called for purposes of exposure, then there can be little doubt that the mere summoning of petitioner was an attainder. It cannot be doubted that exposure is punishment in the attainder sense. *United States* v. *Brown*, 381 U. S. 437. It is a judgment handed down without judicial trial that an individual is guilty of subversion. He is punished by the publication of that fact so that a badge of infamy can be attached to him. The exposure system is fostered by the same climate as that in which attainders flourished. It reflects the extent to which popular clamor and prejudice have forced a breach in the forms of law.

VII.

The compelled disclosures invaded rights protected by the First Amendment and are not "balanced" by overriding public interests. There is no question that under *Barenblatt* inquiries of the kind involved here raise First Amendment questions and that these questions can be resolved in favor of the Government only if there is a legislative purpose and a strong legislative need for the information sought. Here the Committee's purpose was too ambiguous (even if legislative) to override petitioner's First Amendment rights. Besides the Committee already had detailed information about petitioner. He had filed non-Communist affidavits for five years prior to the date of his appearance. There was no probable cause that he possessed information that might be helpful to the Committee. The hearing resulted from "indiscriminate dragnet procedures." And quite apart from these considerations, an expert testified that the First Amendment claims asserted here outweighed the interests of the Government in obtaining answers to the questions.

The Court must finally recognize that we are not under a threat of internal subversion of such menacing proportion as to require continuing curtailment of our freedoms. The premises either of a domestic or a foreign threat are wholly unreal and if valid reasons ever supported the constitutionality of compulsory disclosures in this area they are now anachronistic and must be reexamined in the light of a changed domestic and world situation.

VIII.

Rule XI itself is unconstitutional by reason of its vagueness and breadth, and here too changing circumstances require a fresh look by the Court.

The Rule deals with speech alone and authorizes a committee of Congress to label and classify ideas. This legislative thrust into a First Amendment area is not well defined but is vague and amorphous. The Rule when read together with the contempt statute not only offends due process (*Lanzetta* v. *New Jersey*, 306 U. S. 451, 453) but even standing alone does not satisfy the demands for precision which the First Amendment imposes on restraints on the protected freedoms. *Baggett* v. *Bullitt*, 370 U. S. 360.

In a series of cases the Court has condemned as excessively vague statutes whose terminology mirrors that of Rule XI. The Court in *Watkins, supra* at 202, noted the inherent vagueness of the Rule. The vagueness of the Rule has long been noted by other authorities. Prior to the time of the adoption of the Rule, members of Congress complained that such terms as "un-American" and "subversive" lacked meaning, and the Committee itself has recognized no meaningful limitation on the permissible range of its activities.

The legislative background and committee interpretation of the terms of the Rule are not helpful in limiting its scope. When the initial resolution was passed in 1938, members of Congress unsuccessfully sought to have its meaning defined. The members of the Committee themselves in 1940, during the debate on the reenactment of the resolution were in conflict on the meaning of the term "un-American." And in 1942 a minority report of the Committee complained of the majority's tendency to brand as subversive and un-American viewpoints which it disapproved. In 1945 the committee sought aid from a private institution in interpreting the resolution. Its own interpretations of the term "un-American" have included such standards as the denial of the existence of a God, absolute

social and racial equality, destruction of private property, advocacy of a planned economy and opposition to the system of checks and balances.

The unconstitutional range of the resolution is best seen from the Committee's application of it in its day to day functioning. In the course of hearings the Committee, or various of its members, has characterized as "un-American" such programs and issues as the legislation proposing the reorganization of the Court, criticism of members of Congress, and of the FBI, and support of New Deal legislation. In the same way, belief in the extension of universal suffrage, support for Harry Bridges, advocacy of anti-poll tax legislation and criticism of the McCarran-Walter Immigration Act have been characterized as evidence of subversion.

More recently the Committee has attacked criticisms of blacklisting in the theatre, liberal Christianity, the scholarship program of the National Science Foundation, the Peace Movement, and the movement to abolish or curb the Committee itself.

The recent investigation of the Ku Klux Klan demonstrates the uncertainty and the vagueness of the Committee's mandate. After Chairman Walter insisted in 1961 that the Ku Klux Klan activities fell outside of its mandate the Committee decided in 1965 that it was empowered to investigate that organization. It cannot be doubted that only the personal opinions and private interests of the Committee members serve as a limit to the scope of the resolution.

If the scope of the Committee's power were confined to its mandate to investigate "propaganda" and "propaganda activities" such a mission would be too broad to permit a

limiting constitutional construction. But the Committee has long since scrapped its propaganda jurisdiction in favor of the policing of political association and expression which it was the purpose of the First Amendment to safeguard.

IX.

This case requires reversal because petitioner was denied the protections of *Watkins* v. *United States*, 354 U. S. 178, 208-209 requiring an explanation to the witness of the matter under inquiry and the pertinency of specific questions when they are otherwise obscure. Petitioner had excellent ground for believing that the purpose of the Committee as announced by the Chairman was to expose him and to break his union. He had a right to assume that all of the questions asked of him would be pertinent only to these purposes and indeed filed objections with the Committee protesting these announced purposes. His objections thus did not reflect an awareness of a contemplated legitimate subject under inquiry and he had a right to assume that all of the questions would be pertinent to himself and to an attempt to injure him and his union rather than to any other subject.

We think that the motion which petitioner filed at the outset of the hearing "triggered" the Committee's responsibility to set out clearly the claimed subject under inquiry. The Committee evidently thought so too, for it denied the motion at the end of the hearing *"nunc pro tunc."* But this delayed action could hardly cure the failure of the Committee to conform, at the outset of the hearing or at the time of the refusals to answer, to the requirements of *Watkins*.

X.

The subcommittee was required to overrule the objections stated in petitioner's motion objecting to the jurisdiction of the Committee, to apprise him that it had so acted and to require him to proceed. *Quinn* v. *United States*, 349 U. S. 155. Instead, as we have seen, the Committee waited until after all of the relevant questioning had concluded and then denied the motion. Nor was the direction requirement met by the fact that petitioner's refusals to answer specific questions were overruled and he was directed to answer those questions. The Committee had made it clear that it had no intention of ruling on the objections in the motion, and the objections to specific questions were not coextensive with the grounds urged in the motion.

ARGUMENT

I.

The indictment is insufficient because it fails to specify the subcommittee's authority to investigate the matter alleged to be under inquiry.

In *Russell* v. *United States*, 369 U. S. 749, the Court set aside petitioner's prior conviction because of the failure of the indictment to allege the subject under inquiry at the time of this interrogation. While the second indictment, under review here, repairs the omission in the prior indictment specifically ruled on by the Court, it nevertheless is fatally defective in that it fails to specify the authorization of the subcommittee to conduct an investigation into the subject matter allegedly under inquiry.

A. The Indictment Does Not Allege the Authority of the Subcommittee to Investigate the Matter Under Inquiry.

The inquiry which is involved in this case is stated in the indictment to have been "Communist Party activities within the field of labor" (R. 1). This is apparently a reference to a portion of the announcement of the subcommittee chairman at the hearing of the subject under inquiry (*supra*, pp. 12-13). There is no allegation of the manner in which Chairman Moulder and his subcommittee acquired the authority to conduct the investigation.

The indictment sets forth the following sources for the subcommittee's authority to investigate the subject claimed in the indictment to be under inquiry (R. 1-2):

1. Legislative Reorganization Act of 1946, Section 121(q), 60 Stat. 828 and House Res. 5, 84th Congress. But the above statute and resolution merely empower the Committee and its subcommittee to investigate the extent of "Un-American propaganda activities" and the diffusion "of subversive and un-American propaganda." On their face they cannot be construed as an authorization to a subcommittee to probe into "Communist activities within the field of labor."

2. An appointment on February 9, 1955, by the Chairman of the Committee of a subcommittee to conduct the hearing and the fixing of a time at which it was to be held. But this is no substitute for an allegation that the Committee took some action which defined and delegated the subject matter to be probed.

3. The Committee resolution of January 20, 1955, clothing the Chairman with the power to appoint sub-

committees. This, too, brings us no farther in the search for an authorization.

4. An action by the Committee Chairman on February 18, 1955, continuing the hearing until February 28, 1955, and approved by the Committee February 23, 1955. Not only does this recital fail to clothe the subcommittee with authority but it suggests the desperation with which the prosecution futilely groped for something which might legitimize the claim of subcommittee authority.

B. An Investigation by a Subcommittee of the Committee Into a Subject More Restricted Than the Scope of the Enabling Resolution Must Be Authorized.

The statute and resolution referred to in the indictment (*supra*, p. 30) merely give the Committee or its subcommittees the power "to make from time to time investigations" into areas described by Rule XI.

Thus, the Committee's charter on the face of it contemplates discontinuous investigations falling within the area of the Committee's jurisdiction but not necessarily coextensive with it. In this respect it differs from its predecessor, the resolution creating the Special Committee on Un-American Activities (H. Res. 282, 75th Cong., 3rd Sess.) which was created "for the purpose of conducting an investigation" during the course of the 75th Congress*

* The successive resolutions which continued the Special Committee, granted it "the same power and authority" as that set out in the original resolution. H. Res. 28, 76th Cong., 1st Sess.; H. Res. 321, 76th Cong., 3rd Sess.; H. Res. 90, 77th Cong., 1st Sess.; H. Res. 420, 77th Cong., 2nd Sess.; H. Res. 65, 78th Cong., 1st Sess. The last renewal was for a period of two years. See *infra* for discussion of earlier versions of the resolution.

and from its Senate counterpart, the Senate Internal Security Subcommittee of the Senate Internal Security Committee, which is authorized "to make a complete and continuing study and investigation" of the subjects within its jurisdiction. S. Res. 366 (81st Cong., 2nd Sess.).

Moreover, whatever limiting restraints on its jurisdiction may have originally been intended (see *infra* pp. 96-97), the fact is that the Committee, currently and at the time of the hearing in issue, construes its charter to give it investigative jurisdiction over an enormously broad area whose boundaries defy definition (see *infra* pp. 101-118).

In short, the Committee is no longer (either in form or in function) a special committee with jurisdiction to investigate a specific problem or subject and which ceases to operate when its mandate expires or its investigative assignment is exhausted. It is a permanent investigating committee, a unique entity, which is quite alien to the investigative process as it has evolved by statute and developed in Congress. In certain relevant respects the Committee resembles a regular standing committee of the Senate which may conduct "investigations into any matter within its jurisdiction."[10] Such standing committees exercise investigative power by means of carefully drafted authorizations to subcommittees.[11] These authorizations

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[10] Legislative Reorganization Act of 1946, Section 134, 60 Stat. 831-832, 2 U. S. C. 190b. House committees, except for the Committee, do not have subpoena powers and investigations are authorized by special resolution.

[11] See, for example, Resolution of July 17, 1950, of the Senate Committee on the Armed Services, Sen. Doc. No. 230, 81st Cong., 2nd Sess.; Resolution of September 21, 1961 of the Senate Com-

are also the life blood of the Committee's investigative process. (See *infra* p. 37.)

The Committee did not purport in this case to commit the whole range of its powers to the subcommittee which conducted hearings and we doubt whether it could. Without

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mittee on Armed Services, Hearings before the Special Preparedness Subcommittee, 87th Cong., 2nd Sess.

There are two notable differences between the investigations of Senate standing committees and those of the Committee. (1) Investigations by standing committees or their subcommittees are occasional and infrequent; they are called into being by some urgent problem as, for example, the investigation of invasions of privacy by government agencies by a Subcommittee of the Committee on the Judiciary, S. Res. 39, 89th Cong., 1st Sess. (2) Investigations other than those initiated by the Committee both in the Senate and the House are subject to highly intensive supervision both by parent committees and the Congress itself. Because Senate committees are not usually funded for investigations, after approval by a parent committee, authorization for a major investigation is submitted to the Senate for approval and for a special appropriation by means of a detailed resolution which defines the scope of the investigation, the amount of its budget, its duration and the date of a submission of a report. See, for example, S. Res. 20, 84th Cong., 1st Sess.; S. Res. 209, 84th Cong., 2nd Sess.; S. Res. 154, 84th Cong., 2nd Sess. *(Investigation of Federal Employees Security Program)*. The authorizing resolutions are, after general approval, then referred to the Committee on Rules and Administration. See, for example, S. Rep. 21, 89th Cong., 1st Sess. *(Invasions of Privacy)*. When funds are exhausted or the authorized duration ends, renewal must be sought.

Special committee investigations in the House are controlled in like fashion (see, for example, *United States* v. *Fields*, 6 F. R. D. 203 (D. C. D. C.); *United States* v. *Tobin*, 195 F. Supp. 588, reversed on other grounds, 306 F. 2d 270 (App. D. C.); and require both House and Rules Committee approval as well as that of the parent committee if a subcommittee is involved. But the Committee engages in a continuing investigative process which is rarely, if ever, supervised. It is funded through a generous appropriation at the beginning of the session; there is no control over a particular investigation. No report is required on the results of a particular investigation and even in the recent case of the Ku Klux Klan investigation (*infra* p. 114) when additional funds were requested the Committee did not seek approval of the investigation itself

a limiting authorization the Committee would be powerless to compel testimony. The language of the Committee's charter is too vague, broad and general to give precision to the subject under inquiry for purposes of pertinency and due process.[12] Thus, an authorization clearly defining the subject under inquiry is an imperative prerequisite to the exercise of the power of compulsory disclosure.[13]

The indictment, read in the light of the hearing, suggests that the subcommittee independently chose the subject under investigation. But a subcommittee of the Committee or of any other standing legislative committee with investigative power cannot decide on its own to investigate whatever subject strikes its fancy without authorization by Congress or its parent committee, or both. An agent, especially an agent of the Congress using the power to compel testimony in the area of the protected freedoms, cannot define its own authority. *Watkins, supra.*

(Cong. Rec., April 14, 1965, Daily Ed., pp. 7740, 7745). It is in the light of the norm of clearly-defined authorization and tight supervision of the investigative process that the Court must evaluate the Government's contention that the subcommittee's authority need not be pleaded or proved. Surely it cannot be that the Committee which takes as its investigative field the First Amendment freedoms is licensed to pursue a more irresponsible course than other Congressional bodies which confine themselves to the area of conduct.

[12] See *Watkins* v. *United States,* 354 U. S. 178 (1957); *Barenblatt* v. *United States,* 360 U. S. 109 (1959); *Deutch* v. *United States,* 367 U. S. 456 (1961), and *Wilkinson* v. *United States,* 365 U. S. 399 (1961).

[13] While such a clearly expressed delegation is needed to redeem the inadequacies of the resolution for due process and pertinency purposes, it cannot serve to soften or cure the intimidating impact of the vague language of the resolution itself on First Amendment freedoms. See *infra* p. 101.

If members of the Committee (or any standing committee), armed with a designation as a subcommittee, were to hold hearings into a particular subject matter an otherwise unjustified refusal to respond to its questioning could not ground a contempt citation under Section 192. This is so because its authority and its mission must be delegated by a full committee. Just as the Committee (or any standing committee) functions as the agent of the Congress under the resolution which defines the terms of its agency, so the subcommittee is an agent of its parent committee. It lacks competence to proceed without a charter defining the terms of its mission.

Moreover, without such an authorization, an investigation by the Committee lacks a legislative purpose. As the Court held in *Watkins, supra,* at 201:

> "It is the responsibility of the Congress in the first instance to insure that compulsory process is used only in furtherance of a legislative purpose. That requires that the instructions to an investigating committee spell out the group's jurisdiction and purpose with sufficient particularity."

Since, as the Court has repeatedly held, the Committee's enabling resolution does not define its legislative mission with sufficient particularity, the Committee is required to refine it through its delegations in conformity with Congressional need. The Committee has a non-delegable responsibility to determine whether Congress would be aided by an investigation into a given subject, how long it should last, and when it should be timed so as to best serve the legislative function. For example, if the Committee hoped to influence the passage of legislation, it would time its in-

vestigation to harmonize with the legislative schedule of Congress.[14]

The parent Committee must decide, assuming that a proposed investigation would serve a legislative function, whether its scope falls within the Committee's basic charter.[15] This is particularly true where, as here, the scope of the investigation is not coextensive with the Committee's enabling resolution, but is more limited. Indeed, in this case, the claimed subject of the hearing as recited in the indictment—"Communist Party activities in the field of labor"—is nowhere referred to in the enabling resolution or is even suggested by it.

Because the Committee has traditionally shunned its legislative responsibilities in favor of exposure, its procedures have never conformed to available models of legislative investigations, but it does pay some lip service to the requisite formalities. Thus, the Committee characteristically acts through subcommittees which are appointed by the Chairman (R. 9).[16]

The subcommittee's authorization for the investigation is the responsibility of the full Committee, a majority vote

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[14] No Congressional investigation leaves for the determination of the investigating panel alone such questions as schedule and duration of the investigation, the date when it must report or when or whether recommendations are to be submitted. See, for example, S. Res. 39, 81st Cong., 1st Sess. (*Invasions of Privacy*).

[15] Where there is doubt as to committee's authority, clarification is sought in the appropriate branch of the Congress. See *Study of Administrative Practice and Procedure*, Congressional Record (Daily Edition) February 8, 1965, p. 2195. The Committee has sought clarification of its mandate not from Congress but from the Brookings Institution (*infra* p. 113).

[16] The Internal Security Subcommittee of the Senate Judiciary Committee, in contrast, sits with its full membership or in a short quorum (R. 9).

of which must approve all "major" investigations. Rule 1 of the Committee's Rules, *Appendix*, p. 129.

These majority decisions, usually by resolution, are regarded by the Committee as so important that, for a number of years now, they have been recited at hearings and printed.[17] And when such an authorization lapses at the end of a Congress before the investigation is completed, a renewing resolution is adopted to validate its continuance.[18]

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[17] See, for example, the opening statements made by the chairman at the following Committee hearings held from the 85th to the 88th Congress:

Investigation of Communist Activities in the Buffalo, N. Y., Area—Part 1, October 2, 1957;

Investigation of Communist Penetration of Communications Facilities—Part 1, July 17, 1957;

Investigation of Communism in the Metropolitan Music School, Inc., and Related Fields—Part 1, April 9, 1957;

Investigation of Communist Infiltration and Propaganda Activities in Basic Industry (Gary, Ind., Area), Monday, February 10, 1958;

Investigation of Communist Activities in the New England Area—Part 1, Tuesday, March 18, 1958;

Communist Infiltration and Activities in Newark, N. J., September 3, 1958;

Passport Security—Part 1 (Testimony of Harry R. Bridges), April 21, 1959;

Communist Infiltration of Vital Industries and Current Communist Techniques in the Chicago, Ill., Area, May 5, 1959;

Western Section of the Southern California District of the Communist Party, Part 1, October 20, 1959;

Communist Outlets for the Distribution of Soviet Propaganda in the United States, Part 1, May 9, 1962;

Communist Activities in the Peace Movement, December 11, 1962.

[18] See, for example, the opening statement at the Committee Hearings on *Assistance to Foreign Communist Governments*, March 6, 1963.

C. The Indictment Was Insufficient Because It Failed to Specify the Subcommittee's Authority.

Since delegation by the Committee to its subcommittee of its investigative authority in precise and clearly defined language is not a casual or optional aspect of its functioning, but is dictated by the Committee resolution, the pertinency requirement of the contempt statute, the due process provision of the Constitution, and by the nature and purpose of the legislative process itself, it is the cornerstone of the Government's case and should have been pleaded in the indictment. If the grand jury did not have before it prima facie evidence that the subcommittee was authorized to conduct the inquiry through a legally sufficient delegation, there was no basis for the return of the indictment and petitioner should not have been required to stand trial.

Here the jurisdiction of the subcommittee was seriously challenged at the hearing (*supra*, pp. 10-11). Petitioner's contention that the subcommittee had no legislative purpose was an important issue in the case and the indictment should have clarified it without requiring him to guess.

If, as the Government now contends, the investigation was (or must have been) authorized in an earlier Congress, the allegation of that fact would have required the indictment's dismissal on the ground of lapse of authority. On the face of it, House Resolution 5 of the 84th Congress, which implemented the Legislative Reorganization Act could hardly have authorized an inquiry allegedly begun before the Committee was activated and its membership elected. Besides, the House is not a continuing body, and its powers end at the conclusion of each Congress. An investigation beyond a term of Congress can no longer aid it in performing a legislative function. See *Jurney* v. *Mac-*

Cracken, 294 U. S. 125, 141; *Anderson* v. *Dunn*, 6 Wheat. 204, 225, 230, 231; *McGrain* v. *Daugherty*, 273 U. S. 135, 171.

The prosecution obviously thought that it was necessary to allege facts indicating the subcommittee's authority and its failure to do so was due neither to choice[19] nor chance (R. 133, 206). The patchwork charge against petitioner is plainly invalid and should have been summarily dismissed.

In *United States* v. *Lamont*, 18 F. R. D. 27 (S. D. N. Y.), aff'd, 236 F. 2d 312 (C. A. 2), the trial court had before it an indictment reciting that the Permanent Subcommittee on Investigations of the Committee on Government Operations was holding hearings pursuant to the Legislative Reorganization Act and various resolutions. No statement of subcommittee authority or scope was set forth in the indictment. The committee involved in that case was a Senate committee authorized to inquire into governmental activities to determine "its economy and efficiency." The trial court held that the provision in the Legislative Reorganization Act authorizing the Committee on Government Operations to function through subcommittees did not confer authority on the subcommittee to conduct the investigation under review.

In dismissing the indictment, Judge Weinfeld ruled (18 F. R. D. at 36):

> "And if a defendant is to have a fair opportunity to defend himself he is entitled to be informed of the charge and to have the indictment specify that the committee whose authority he allegedly flouted was

[19] In both the *Grumman* and *Silber* cases, *supra*, returned by the grand jury that indicted petitioner, the indictment specifically refers to the Committee delegation to the subcommittee.

duly authorized to conduct the inquiry—just as the indictment must plead every other essential element. An element of crime is an essential factor without which there is no crime. And if no authority was ever delegated to the Permanent Subcommittee by the parent committee or the Senate, there is no basis for prosecution under §192 no matter how contumacious a witness might have been." [Footnote omitted]

In affirming Judge Weinfeld's decision, Chief Judge Clark held (236 F. 2d at 315):

> "It is of course the function of an indictment to set forth without unnecessary embroidery the essential facts constituting the offense and thus accurately acquaint the defendant with the specific crime with which he is charged. But an allegation for lack of which the prosecution must evidently and as a matter of law fail cannot be regarded as superfluous. • • • • •
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> "The deficiencies in the indictments now before me are thus quite fundamental and go far beyond the question whether defendants have been put on adequate notice. Rather the question is whether defendants are to be put on trial on an allegation which on its face charges no offense. • • • • •
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> "There is no allegation in the indictments here linking the inquiry conducted by the subcommittee to the grant of authority dispensed to its parent committee."

The precise issue presented here—whether an indictment for contempt under Title 2, Section 192 in connection with a hearing involving the Committee must allege the authority of the panel delegated to conduct the investigation—was

carefully weighed by the Court of Appeals for the Second Circuit in *United States* v. *Seeger*, 303 F. 2d 478. The court ruled that a conviction for violation of Title 2, Section 192 cannot be sustained unless it appears from the indictment that the subcommittee was duly empowered to conduct the investigation and that the inquiry was within the scope of the grant of authority.

In that case, in contrast to this one, the indictment did recite the fact that the full committee had "directed that an investigation be conducted of Communist infiltration in the field of entertainment." 303 F. 2d, at 481, note 5. The court nevertheless held that "the indictment was defective because it had failed to properly allege the authority of the subcommittee to conduct the hearing in issue and to set forth the basis of that authority accurately" (*supra*, at 481).

Even prior to the Court's decision in the *Russell* case, indictments under Title 2, Section 192, in the Second, Sixth and Seventh circuits specified the authority of the subcommittee in allegations of pertinency. See *Russell*, *supra*, at note 7. And under the compulsion of the *Russell* case, indictments in the District of Columbia circuit under the contempt statute now specify the delegated authority of the subcommittee. See *supra*, p. 39.

We submit that the *Russell* case necessarily requires a statement of the authorized mission of the subcommittee. The *Russell* case ruled that the subject under inquiry must be set forth in the indictment to permit a determination of pertinency. This indictment's reference to a subject under inquiry is apparently to the announcement made by subcommittee Chairman Moulder at the commencement of the hearing. But such an announcement is hardly an authoritative statement of the subcommittee's delegation. Congress-

man Moulder's statement may perhaps have reflected a Committee authorization, or it may have been an improvisation. The questions propounded at the hearing may have been pertinent to the announced subject-matter but not to the subcommittee's authorization. The *Russell* case obviously requires that the indictment enlighten the defendant and the court not merely as to the matter under inquiry as announced at the hearing, but also as to the matter confided to the subcommittee in the first place. The former allegation might be adequate for guidance of the court and defendant in responding to the pertinency issue in the due process sense, but an allegation of the subcommittee's mission is indispensable to a resolution of the issue of statutory pertinency. See *Deutch* v. *United States*, 367 U. S. 456, 468.

It is plain that the "question under inquiry" referred to in the contempt statute is the subject described in the authorization for the hearing at which the questioning took place. When the contempt statute was passed, investigations were conducted only by *ad hoc* "special" committees and were coextensive with the full range of their authority.[20] Since then, both the Court[21] and the House[22] have concluded

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[20] See Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 Harv. L. Rev. 153, 170-186.

[21] *Barry* v. *United States, ex rel. Cunningham*, 279 U. S. 597, 613; see *Watkins* v. *United States*, *supra*, at 694 (dissenting opinion).

[22] In 1955 the House, in adopting Rule XI (25) (i) providing that "the chairman at an investigative hearing shall announce in an opening statement the subject of the investigation" made clear its view that pertinence under the contempt statute is to be determined by the committee's authorization not by the opening statement. See H. Res. 151, 84th Cong., 1st Sess., 101 Cong. Rec. 3569.

that statutory pertinence is determined not by the opening statement but by the authorizing resolution, which in the case of the Committee, as we have seen, must be a mandate narrower in scope than Rule XI. As Judge Weinfeld pointed out in *United States* v. *Lamont*, 18 F. R. D., *supra* (at 35):

> "There is an added reason why this element should be pleaded. With pertinency also an essential element, it is important for the defendant in preparing his defense to know the claimed source of authority since 'The initial step in determining the pertinency of the question is to ascertain the subject matter of the inquiry then being conducted by the subcommittee.' [*Bowers* v. *United States*, 92 U. S. App. D. C. 79, 202 F. 2d 447, 448.] Or, as stated by Mr. Justice Frankfurter in the *Rumely* case, the resolution under which the committee purports to act is the 'controlling charter' of its powers and governs 'its right to exact testimony.' [*United States* v. *Rumely*, 345 U. S. 41, 44, 73 S. Ct. 543, 545, 97 L. Ed. 770.] Since pertinency must be and has been pleaded, there is no logical reason why the authority of the committee should not likewise be pleaded."

See also *Sacher* v. *United States*, 356 U. S. 576, 577, and *United States* v. *Rumely*, 345 U. S. 41, 48.

Moreover, quite apart from questions of authorization and pertinency, allegations of subcommittee authority are necessary to permit an initial determination as to whether, in a hearing of restricted scope such as this, the authority exercised by the subcommittee conforms with the authority delegated. Just as full "committees are restricted to the

missions delegated to them" (*Watkins* v. *United States*, *supra*, at p. 206), so subcommittees are restricted to their delegated authority. Without a statement of what that authority is, a reviewing court is powerless to determine whether the matter alleged to have been under inquiry at the hearing falls within the subcommittee's mandate. See *United States* v. *Rumely*, 345 U. S. 41, 48.[23]

Neither *United States* v. *Josephson*, 165 F. 2d 82, cert. denied, 333 U. S. 838, nor *Sacher* v. *United States*, 252 F. 2d 828 (App. D. C.), reversed on other grounds, 356 U. S. 576, is a persuasive precedent for the Government's position for the reasons set forth in *Seeger*, *supra*, at 483, note 12, 484, note 17. Besides, the committee involved in *Sacher*, the Internal Security Subcommittee of the Senate Judiciary Committee, considers itself a "special" committee engaged in a continuous investigation coextensive with its charter. The limited statement of purpose at the hearing made by the panel's chairman is in its view redundant and not binding on the subcommittee.[24] The court below, in approving the *Sacher* indictment, accepted a view of the In-

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[23] In *United States* v. *Kamin*, 135 F. Supp. 382 and 136 F. Supp. 791 (D. C. Mass.), District Judge Aldrich denied a motion to dismiss a comparable indictment. The case went to trial, and Judge Aldrich dismissed some of the counts at the conclusion of the Government's case and directed a verdict of acquittal at the end of the trial, basing his rulings on the lack of pertinent relation between the questions put to the defendant at the subcommittee's hearing, and the matters into which the subcommittee was authorized to inquire. These defects would have been plainly disclosed by a properly-drawn indictment and "an unnecessary trial might have been averted had it been made clear in advance thereof that there was lacking an essential element of the crime charged, namely, that the inquiry was within the subcommittee's authority." *United States* v. *Lamont*, *supra*, at 315.

[24] See *Shelton* v. *United States*, 280 F. 2d 701 (App. D. C.), affirming 148 F. Supp. 928, reversed on other grounds, *Russell* v. *United States*, 369 U. S. 749; *United States* v. *Knowles*, 148 F.

ternal Security Subcommittee's charter which created a morass of pertinency problems until *Russell* discredited it, and which, in any event, has never been applicable to the Committee.

II.

There is no proof of the authority of the subcommittee to conduct the investigation.

Even if the proof could cure the defect in the indictment,[25] the Government's case would not be helped for there is no proof of the subcommittee's delegation. In addition to the four inadequate sources of subcommittee authority already discussed, the record indicates only that at the very first

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Supp. 832, reversed on other grounds, 280 F. 2d 696 (App. D. C.); *Flazer* v. *United States*, 235 F. 2d 821, 825 (App. D. C.), reversed on other grounds, 354 U. S. 929 and *Liveright* v. *United States*, 280 F. 2d 708, reversed on other grounds, 369 U. S. 749.

At the trial of the *Sacher* case, the subcommittee's counsel, when asked to state the subject under inquiry, identified it with Clause 3 of its basic resolution (*Sacher* Record p. 11): "The Committee was engaged in its continuing investigation into the scope, the extent, and the effect of subversive activity in the United States."

At the first *Shelton* trial (Record p. 23), subcommittee counsel testified "that the inquiry [was] being conducted pursuant to this resolution [Senate Res. 366], and it is not the case, that there was any smaller, more limited inquiry being conducted.

"This committee was conducting the inquiry for the purpose contained in the resolution and no lesser purpose so that, in that sense, the [question under inquiry] will be supplied by his reading the resolution."

In the first *Liveright* trial, subcommittee counsel testified (Record pp. 89-90, 93) "This investigation, as I say . . . is continuous and unchanging. The subject matter of the investigation at all times is the activities of the Communist organization as it operates within the United States . . . [It is] part of a continuing investigation . . . one entity which never terminates . . ."

[25] But see *Russell* v. *United States*, *supra*, at 769, and cases cited.

session of the Committee at which the hearing was discussed, a Committee member moved that petitioner and another witness "be subpoenaed to appear before a subcommittee of the Committee on Internal Security [*sic*] in open hearing at Fort Wayne, Indiana . . ." (*supra*, p. 6). This, no more than the remainder of the entry which records the appointment of a subcommittee, establishes the authority of the subcommittee to conduct a hearing on the subject claimed to be under inquiry—although it does strongly suggest that the Committee was more interested in interrogating petitioner than in giving legislative assistance to Congress. Since the Committee's entire file on the hearing was produced in court (*supra*), it is clear that there was no authorization for the investigation whatsoever.

Finally, the record contains testimony (*supra*, p. 16) that the Committee had commenced a pursuit of the Union some years prior to the hearing. This testimony, introduced to show "probable cause", cannot be converted into proof that the subcommittee which conducted the hearing in issue was properly authorized to do so.

The lack of proof of "preliminary control" (*Watkins, supra*, at 203) is fatal. The "clear determination" which is particularly required in order to avoid irresponsible investigative invasion of the protected freedoms was totally lacking (*Watkins, supra*, at 205).

In the *Seeger* case, *supra*, Judge Moore disagreed with the majority that the indictment was defective. But he found a fatal failure of proof of the subcommittee's authority (at 487):

> "Seeger's refusal to answer did not occur before the Committee but only before a Subcommittee. For

this reason, Seeger argues that the authority of the subcommittee must be shown. Although creation of the Committee may be adequately alleged in the indictment, this fact does not dispense with the necessity of proving upon the trial the authority of the subcommittee before which Seeger refused to answer, commonly known as proof of the 'chain of authority.' The government offered a document dated June 8, 1955 (Exh. 7) authorizing the Clerk to 'proceed with the investigation of communist infiltration in the field of entertainment in New York.' Had Seeger appeared before the Clerk and refused to answer, it is more than questionable whether this could have been a Section 192 violation. Had the Clerk proceeded to appoint a subcommittee, his power so to do would have been equally doubtful. But neither of these events occurred.

"Somewhat in advance of trial, the government disclosed to Seeger a document (Exh. 8), dated July 27, 1955 (not mentioned in the indictment or in the government's bill of particulars), merely announcing a date for the hearings (August 15-18) and stating the names of the subcommittee appointed. Even the most liberal construction cannot transfer Exhibit 8 into a resolution of the Committee vesting its authority in a subcommittee and ratifying a previously appointed group of three. I would, therefore, hold that there had been a failure of proof of authority."

If the series of authorizing steps in the *Seeger* case were deemed to be inadequate to satisfy the Government's burden, then *a fortiori*, the proof in this case is inadequate.

III.

The conviction must be reversed because the hearing was held in violation of a Committee Rule.

Rule I of the Committee's Rules of Procedure provides that "No major investigation shall be initiated without approval of a majority of the Committee" (Appendix, p. 129). This Rule was in effect at the time of the hearing in this case (R. 88-89).

It can hardly be doubted that, for purposes of Rule I, this investigation was a "major" one.[26] It lasted three days and it is two hundred printed pages long (G. Exh. 12). The record affirmatively shows that there was no decision by a majority of the Committee or anyone else even to conduct a hearing into the subject under inquiry—let alone an investigation (*supra*, p. 9).

The Rule requires no elaborate exegesis. It is a familiar type of restraint on investigating committees to prevent abuse of power and harassment of witnesses through "one man rule" and to reduce political partisanship in the authorization of investigations.[27] The need for such restraint has been frequently noted.[28]

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[26] It seems plain from the face of the Rule that a "major investigation" is simply a probe which cannot be classified as a "preliminary inquiry," initiated by the staff.

[27] Compare Rule I, Senate Government Operations Committee; Rule 8, House Government Operations Committee; Rule 1, House Ways and Means Revenue Subcommittee. See also report of the Subcommittee on Rules, Senate Committee on Rules and Administration, "Rules of Procedure for Senate Investigating Committees" (83rd Congress, 2d Session) p. 15; Hearings before the Subcommittee on Rules, "Rules of Procedure for Senate Investigating Committees" (83rd Congress, 2d Sess.), pp. 136, 141-142, 261) (testimony of Harold H. Velde) and 291 (testimony of Robert Kunzig).

[28] Footnote on following page.

The Rule is a modest attempt to reconcile power and responsibility. The Court has noted that especially in investigations touching on beliefs, expressions or associations "procedures which prevent the separation of power from responsibility" cannot be lightly disregarded. *Watkins* v. *United States,* 354 U. S. 178, 197, 215. The Rule should therefore have been meticulously observed. Since it was clearly violated the conviction cannot stand. See *Yellin* v. *United States,* 374 U. S. 109; *Shelton* v. *United States, supra; Liveright* v. *United States, supra; United States* v. *Grumman, supra,* ftn. 1 and *United States* v. *Silber, supra,* ftn. 1.

It cannot convincingly be maintained that prior approval can be inferred from the fact that the hearing was conducted or that petitioner was cited for contempt. The hearing was conducted only by three Committee members and the contempt citation supports no inference of prior approval. Compare *United States* v. *Rumely,* 345 U. S. 41, 47-48. Indeed even if there were in fact actual ratification of the investigation the position of the Government would not be improved. Petitioner had a right to have the full

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[28] See *Report on Congressional Investigations* by Special Committee on Individual Rights of the American Bar Association (1954, p. 27):

> "We are dealing with investigations by committees in the interests of Congress and the nation, not investigations by individuals. Abdication by the committee in favor of its chairman blurs this whole concept, encourages arbitrary action, and allows the public to blame Congress for the errors thus permitted with its authority and has proved to be undesirable. Committee responsibility is essential and it can be maintained only if the majority of the committee join in making the principal decisions."

See also Maslow "Fair Procedure in Congressional Investigations", 54 Col. L. R. 839, 856-857 (1954).

Committee responsibly determine in advance whether or not to conduct the investigation. And the invasion of his First Amendment rights could not be subject to ex post facto ratification. See *Shelton* v. *United States*, *supra* at 607; cf. *Christoffel* v. *United States*, 338 U. S. 84.

Nor could the requirements of the Rule be satisfied by the claim, asserted by the Government, that the hearing was a "continuing investigation" which must have been approved at some time in the past. Even if there were in fact earlier approval—none has been proved or even referred to—the requirement of the Rule would not be satisfied. As we have already noted (*supra*, pp. 38-39) hearings conducted prior to the first session of the Eighty-third Congress could not be continued into a new Congress without a fresh authorization. It is simply not the case as the Government seems to contend that congressional committees investigating subversion enjoy a license to conduct marathon non-stop probes based upon claimed authorization in the remote past. Only a renewed authorization could effectively continue an investigation, uncompleted at the close of a session of Congress. And, indeed, this is the very practice followed by the Committee (*supra*, p. 37).

IV.

The Committee's hearing was an exercise of the unconstitutional power of exposure.

It is our contention that the hearing which gave rise to the petitioner's contempt citation was called for reasons unrelated to the legislative process. In making this contention, we recognize that the investigative power is a broad one and is not confined to investigations in connection with a specific piece of legislation, proposed or enacted. A Congressional committee may investigate to determine whether a law needs amendment or is being properly enforced. Similarly, investigations may broadly probe the proper expenditure of public funds.

We do not contend that an otherwise proper exertion of the power to investigate is vitiated by the fact that harm to the witness incidentally results from such inquiry. Nor do we challenge the view that the courts must extend hospitality to asserted legislative justifications of the power to investigate. The doctrine of the separation of powers requires this. But this same doctrine also requires that the courts exercise the utmost vigilance in rejecting assertions of legislative power which are poorly disguised usurpations of the law-enforcement function.

A. The Congressional Power of Investigation Must Be Confined to the Limits of the Legislative Process.

The Constitution does not in express language give Congress the power to investigate. The power to investigate is an implied power. Thus, the power to investigate must be

in aid of the law-making power—not something separate and distinct from it. Our Government is one of limited and enumerated powers; the totality of the authority of Congress under Article I, Section 1, is but the authority to exercise the "legislative power granted herein."

The Court long ago said of the investigatory power (*Kilbourn* v. *Thompson,* 103 U. S. 168, 191) that, "It will scarcely be contended by the most ardent advocate of this power in that respect that it is unlimited." The exercise of the power must be confined to matters within the constitutional authority of Congress. Like other implied powers, it "is a means to an end and not the end itself" and "rests simply upon the implication that the right has been given to do that which is essential to the execution of some other and substantive authority expressly conferred." *Marshall* v. *Gordon,* 243 U. S. 521, 541.

In 1927, in *McGrain* v. *Daugherty,* 273 U. S. 135, 173-174, the Court reiterated that the power to investigate is not a "general" one but must be exercised for a legislative purpose:

> "... the two houses of Congress, in their separate relations, possess not only such powers as are expressly granted to them by the Constitution, but such auxiliary powers as are necessary and appropriate to make the express powers effective; and ... neither House is invested with 'general' power to inquire into private affairs and compel disclosures, but only with such limited power of inquiry as is shown to exist when the rule of constitutional interpretation just stated is rightly applied."

In 1929, in *Sinclair* v. *United States,* 279 U. S. 263, 292, the Court repeated the central thesis of the *Kilbourn* case, *supra,* that the individual has "the right to be exempt from all unauthorized, arbitrary or unreasonable inquiries and disclosures in respect of their personal and private affairs," and cited with approval all of its historic rulings protecting personal and private rights, *Interstate Commerce Commission* v. *Brimson,* 154 U. S. 447, 478; *Harriman* v. *Interstate Commerce Commission,* 211 U. S. 407;[29] *United States* v. *Louisville & Nashville R. Co.,* 236 U. S. 318, 335; *Federal Trade Commission* v. *American Tobacco Co.,* 264 U. S. 298, 305, 306.

The limitation on the power of Congress to conduct investigations was again emphasized by the Court in *Quinn* v. *United States,* 349 U. S. 155, 160-161:

> "But the power to investigate, broad as it may be, is also subject to recognized limitations. It cannot be used to inquire into private affairs unrelated to a valid legislative purpose [citing *McGrain* v. *Daugherty,* 273 U. S., at 173-174; *Kilbourn* v. *Thompson,* 103 U. S. 168, 190]. Nor does it extend to an area in which Congress is forbidden to legislate [citing Compare *United States* v. *Rumely,* 345 U. S. 41, 46]. Similarly, the power to investigate must not be confused with any of the powers of law enforcement; those powers are assigned

[29] It was concerning this case that Mr. Justice Holmes wrote to Harold J. Laski:

> "The claim of the Interstate Commerce Commission in I. C. C. v. Harriman, 211 U. S. 407, made my blood * * * boil and it made my heart sick to think that they excited no general revolt. The soft period of culture that I spoke of the other day tended to oblivion of the fighting significance of guarantees." *Holmes-Laski Letters,* the Correspondence of Mr. Justice Holmes and Harold J. Laski, 1916-1935, 21.

under our Constitution to the Executive and the Judiciary [citing *Kilbourn* v. *Thompson*, 103 U. S. 168, 192-193]. Still further limitations on the power to investigate are found in the specific individual guarantees of the Bill of Rights, such as the Fifth Amendment's privilege against self-incrimination which is in issue here."

In *Watkins* v. *United States, supra*, at 187, 200, the Court stated,

"There is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress . . . Investigations conducted solely for the personal aggrandizement of the investigators or to 'punish' those investigated are indefensible.

* * * * *

". . . We have no doubt that there is no congressional power to expose for the sake of exposure."

In *Barenblatt* v. *United States*, 360 U. S. 109, 133, the Court repeated:

"Broad as it is, the power is not, however, without limitations. Since Congress may only investigate into those areas in which it may potentially legislate or appropriate, it cannot inquire into matters which are within the exclusive province of one of the other branches of government. Lacking the judicial power given to the Judiciary, it cannot inquire into matters that are exclusively the concern of the Judiciary. Neither can it supplant the Executive in what exclusively belongs to the Executive."

These decisions, applying the principle of separation of powers[30] impose upon Congressional investigative power certain clear limitations:

1. The power of investigation is a limited one which is subject to judicial review.

2. A valid legislative purpose is indispensable to support a contempt conviction under Section 192.

3. Investigations by legislative committees are barred from encroaching on the areas of law enforcement which are assigned under our Constitution to the Executive and the Judiciary.[31]

There is no mystery about the nature of legislative power. It involves the establishment through duly enacted law of general standards of conduct. It is rule-making rather than specification. *United States* v. *Brown*, *supra*, at 446, 463. It correspondingly involves, on the investigative level, the exploration and evaluation of a sufficient number of representative examples of a subject or an evil so as to permit a determination whether a rule of general applicability is warranted. It deals with broad patterns not with individual behavior; it seeks information about problems and does not determine the guilt or innocence of individuals. It is *ad hoc* and not continuous, selective and not exhaustive.

The prosecution of individuals for claimed violations of legislatively enacted rules is the duty of law-enforce-

[30] The history and importance of this principle was discussed by the Court in *United States* v. *Brown*, 381 U. S. 437.

[31] Two other limitations on the investigative power, discussed below, are the Bill of Attainder clause and the freedoms guaranteed by the Bill of Rights.

ment officers of the Executive branch and the determination of individual guilt or innocence is the province of the Judiciary. *Fletcher* v. *Peck*, 6 Cranch, 87, 136. Law enforcement and judicial institutions characteristically deal directly with individual cases and not with problems, with the specific and not with the general. Unlike an investigative committee, a law-enforcement agency deals with every instance and not with a representative selection. Courts too are exhaustive and not selective and the nature of their responsibilities gives them institutional continuity which is denied to an investigating committee because of its legislative character.

It hardly need be argued that a committee of Congress can not by itself determine that a standard of conduct (membership, present or past, in the Communist Party) is reprehensible and then proceed to apply sanctions to those it finds guilty ranging from defamation to occupational disqualification. Apart from the fact that such a practice would, considered as a "legislative" activity constitute an attainder mechanism (see *infra*, p. 86), it would plainly usurp Executive and Judicial functions in gross violation of the separation of powers principle.

Such a practice would not only involve a probe into private affairs unrelated to a valid legislative purpose (*McGrain* v. *Daugherty, supra* at 173-174, *Kilbourn* v. *Thompson, supra* at 190; *Sinclair* v. *United States*, 287 U. S. 263, 292) but would confuse the power to investigate with "the powers of law-enforcement" which "are asigned under our Constitution to the Executive and the Judiciary" (*Quinn, supra* at 160-161), would constitute an inquiry "into matters which are within the exclusive province of one of the other branches of government" (*Barenblatt, supra* at 133)

and would be illegal because it sought "to expose for the sake of exposure" (*Watkins, supra* at 187, 200).

These limitations are not in serious dispute. What is less clear is the nature of proof which is necessary to establish either the absence of a valid legislative purpose or the encroachment by a legislative investigating committee on the jurisdiction of the other two branches of government.

In *Watkins, supra,* the Court, while condemning exposure for its own sake stated (*supra,* at 200):

> "But a solution to our problem is not to be found in testing the motives of committee members for this purpose. Such is not our function. Their motives alone would not vitiate an investigation which had been instituted by a House of Congress if that assembly's legislative purpose is being served."

In *Barenblatt* (*supra* at 132), the Court in rejecting an "exposure" contention said:

> "So long as Congress acts in pursuance of its constitutional power, the Judiciary lacks authority to intervene on the basis of the motives which spurred the exercise of that power."

Similarly in *Wilkinson* v. *United States,* 365 U. S. 399, 412, the Court noted that "it is not for us to speculate as to the motivations that may have prompted the decision of individual members of the subcommittee to summon the petitioner."

But in the above cases the Court found that a legislative subject matter was involved in the investigation. Certainly it did not hold that Congressional investigations are immune

from exposure attacks or that a mere claim of legislative purpose is sufficient to overcome all proof to the contrary.

In this and other cases, the cry "motive" has been talismanically raised to repel claims of exposure. It is vital therefore to define precisely what is precluded from judicial inquiry and what is not in a determination of legislative purpose.

The issue may be illuminated by a reference to the oleomargarine tax case (*McCray* v. *United States*, 195 U. S. 27) upon which the Court relied in *Barenblatt*. The *McCray* Court properly rejected contentions that invalid motives tainted the statute. But, suppose a Senate Finance Committee at the turn of the century held hearings ostensibly to determine the feasibility of a tax in which oleomargarine manufacturers were systematically defamed and held up to ridicule, the community of hostile dairymen invited to work its will on them, and the manufacturers told that the aim of the committee was to destroy their markets and put them out of business. Suppose further that the committee compiled lists of past, proved and suspected oleomargarine manufacturers which it circulated among dairymen in order to stimulate a boycott. It need hardly be argued that the *McCray* Court (which in its tax decision relied heavily on the *Kilbourn* case) would have refused to punish recalcitrant oleomargarine manufacturers by contempt proceedings because the committee had departed from a valid legislative purpose and encroached on the functions of the Executive and the Judiciary.

When Congress has enacted legislation which falls within its constitutional competence, a presumption arises that its purpose was a valid legislative one. Courts have no

concern with private aims, ends or motives.[22] It is the legislative act itself encased in the armor of the legislative process—committee reports, debates, bicamerality and executive approval—which commands judicial acceptance.

In the case of legislative investigation, the same general principle applies. Once a legislative subject matter within the Congressional competence is established, a presumption of valid legislative purpose likewise arises.[23] But the process of determining a legislative subject matter is more complex and elusive in the case of investigations than in the case of a statute. We are dealing here with the amorphous area of exploration by an agent of one branch of the legislature whether or not to act rather than with a formal act of legislation by the legislature as a whole. In such a situation, there is no sure guide to a determination of the subject of a legislative inquiry and hence to the validity of the legislative purpose.

In determining this question of fact, a court may—and frequently in the case of the Committee must (see *Watkins, supra; Barenblatt, supra; Wilkinson, supra*)—scrutinize all available sources, resolutions, statements of committee and subcommittee chairmen, the nature of the interrogation, etc., to identify the real subject matter of the inquiry. Courts, we submit, are under a duty to examine with rigor and independence a claim that a legislatively permissible subject is being probed which does not encroach on other branches of

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[22] *Arizona* v. *California*, 283 U. S. 423, 455; *McCray* v. *United States, supra* at 53-59.

[23] This presumption is rebuttable in a contempt proceeding, like any other presumption in a criminal case. *Infra*, p. 65.

government. This duty is created by the principle of separation of powers,[34] by the protection against attainders, by Section 192[35] and by due process of law.[36]

If courts, in ironically misplaced deference to the principle of separation of powers, shrink from the discharge of this duty then there is no protection at all against one of the abuses most feared by the framers of the Constitution—legislative justice. See *United States* v. *Brown, supra.*

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[34] As the *Kilbourn* Court put it (*supra*): "If (the Houses of Congress) are proceeding in a matter beyond their legitimate cognizance, we are of opinion that this can be shown . . ."

[35] See the legislative history of the 1857 contempt statute, recited in *Russell, supra* at 757-758, and in particular the following comment by Senator Bayard made in answer to an objection to the broad language of the bill by Senator Seward (". . . it may be a subject over which Congress has no jurisdiction. It may be foreign from all the provisions of the Constitution . . ."):

> "I am aware that legislative bodies have transcended their powers—that under the influence of passion and political excitement they have very often invaded the rights of individuals, and may have invaded the rights of coordinate branches of the Government; but if our institutions are to last, there can be no greater safeguard than will result from transferring that which now stands on an indefinite power (the punishment as well as the offense resting in the breast of either House) from Congress to the courts of justice. When a case of this kind comes before a court, will not the first inquiry be, have Congress jurisdiction of the subject-matter?—has the House which undertakes to inquire, jurisdiction of the subject? If they have not, the whole proceedings are *coram non judice* and void, and the party cannot be held liable under indictment . . ."

[36] The classic case is *Burnham* v. *Morrisey*, 14 Gray (Mass.) 221 (1859):

> "The [Massachusetts] House of Representatives is not the final judge of its own power and privilege in cases in which the rights and liberties of the subject are concerned, but the legality of its action may be examined and determined by this court."

B. This Is a Case of Exposure for the Sake of Exposure.

The record here, in contrast to cases such as *Barenblatt*, *Williamson* and *Braden*, precludes a deference to the statement of purpose of the subcommittee Chairman for the following reasons:

1. There was no valid delegation to the subcommittee to conduct the investigation.

2. The hearing was initiated not by an authorizing resolution, but by a motion by a Committee member that petitioner be subpoenaed to appear not before the Committee, but before the "Committee on Internal Security" (*supra*, p. 6).

3. The investigation violated a Committee rule designed to prevent abuse of power (*supra*, p. 48).

Under these circumstances, there can be no presumption or inference of legitimate purpose that can be drawn from the hearing.[37] Indeed, it cannot be claimed that the hearing was an exercise of the legislative function at all.

Without a legislative purpose, the proceedings cannot support a contempt conviction under Section 192. Art. I, Sec. 1 of the Constitution. *Kilbourn* v. *Thompson*, *supra* at 173-174; *Sinclair* v. *United States*, *supra* at 292.

But there is more here than the negation of the premises of a valid legislative endeavor. There is a wealth of

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[37] See *United States* v. *Lamont*, *supra*, at 36:

"Nor is it an answer to suggest that a presumption of regularity supports the committee's purported authority to act since that presumption presupposes a prior grant of authority."

affirmative evidence—unprecedented, we believe, in any of the decided cases in this area—that the Committee and its Chairman intended to punish petitioner as a person, to force him out of the Union's leadership and to break the Union. The following facts—*all of them uncontradicted*—overwhelmingly establish the exposure purpose of the hearing:

(1) This was the first hearing conducted pursuant to a "new plan" under which known or suspected "subversives" would be given "a chance in the full glare of publicity" to deny charges against them or "to take shelter behind constitutional amendments," so that they could be "exposed before their neighbors and fellow workers" with a view to insuring that "loyal Americans who work with them will do the rest of the job." The purpose of these hearings, Representative Walter explained, would be "to demonstrate that [the witnesses] are part of a foreign conspiracy" (*supra*, p. 5).[38]

(2) The implementation of this new plan is reflected in the fact that the very first entry in the Committee's file dealing with this case is a decision—not conduct a legislative investigation but to subpoena petitioner (*supra*, at p. 6).

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[38] Chairman Walter could hardly have thought that this "new plan" had a legislative significance. On August 26, 1955, he observed, "Unlike most congressional committees, in addition to the legislative function we are required to make the American people aware if possible of the extent of the infiltration of Communism in all phases of our society." U. S. News and World Report, August 26, 1955, p. 7; quoted in Judge Edgerton's dissenting opinion in *Watkins* v. *United States*, 233 F. 2d 681, 693 (App. D. C.). The Committee *knows* that its exposure objectives cannot be validly achieved through legislation (R. 170); *Barsky* v. *United States*, 167 F. 2d 241, 256 (App. D. C., dissenting opinion).

(3) On the very day the Committee decided to subpoena petitioner, February 9, 1955, the Committee Chairman notified a newspaper in Fort Wayne, where petitioner's union was facing a representation election that it would be issued (*supra*, at p. 7).

(4) On another occasion, before the service of the second subpoena, a local newspaper in St. Joseph, Michigan, where petitioner's union was facing a representation election was notified by the Committee Chairman that a subpoena had been issued (*supra*, at pp. 9-10).[9]

(5) Prior to the hearing, the Chairman held a public session in response to a request for a postponement at which he told the press that the Committee wanted to break the Union "because we do not feel it is good for the United States." The subcommittee Chairman was present and contributed similar observations (*supra*, at p. 8).

(6) The personnel manager of one plant in which a representation election involving the Union was scheduled announced three days before the subpoena was actually issued that petitioner would be subpoenaed—the same personnel manager who on an earlier occasion had obtained access to petitioner's dossier from the Committee's files and made it available to his supervisory staff, their friends and neighbors (*supra*, at pp. 7, 16-17).

(7) In the interview given to the St. Joseph, Michigan, newspaper before the service of a subpoena, Chairman Walter stated that the Committee intended to show that

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[9] It is worth noting that a 1961 revision of the Committee's Rules provides (Rule XVI) that, "No member of the Committee or staff shall make public the name of any witness subpoenaed before the Committee or Subcommittee prior to the date of his appearance."

petitioner and another witness connected with the Union were "card carrying Communists" and that "the rest is up to the community" (*supra*, at pp. 9-10). This was plainly an implementation of the "new plan" to expose witnesses so that "loyal Americans who work with them will do the rest of the job" (*supra*, at p. 5).

(8) The Fort Wayne newspaper was also told prior to the hearing, through its Washington correspondent that the Committee was interested in breaking the Union because its continued existence was not good for the country. The substance of this objective was repeated by the chairman on the floor of the House (*supra*, at pp. 8-9).

(9) When the Chairman's exposure campaign was complained of at the hearing by motion, the subcommittee made no effort to deny the facts or disavow that its objective was exposure (*supra*, at pp. 11-12).

(10) At the hearing the subcommittee Chairman stated that the Committee was dedicated "to expose Communistic activities" and that it was its "intention and purpose to point out to the public, as well as union members, Communist domination or Communist activities wherever it may exist" (*supra*, p. 12; R. 228). Another subcommittee member (Congressman Scherer) proclaimed that "It is the job of this Committee to expose Communists" (*Ibid.*) and "to help [unions] relieve themselves of Communist domination" (*Ibid.*). The third subcommittee member (Congressman Doyle) informed a witness at the hearing that the "Committee's legislative assignment" was "to break up . . . if we can, any Communist Party controls or efforts to control either your union or any other union" (*Ibid.*).

(11) The Committee had no probable cause to believe that petitioner would supply it with information. Despite Chairman Walter's announced intention to demonstrate that the witness was a "card carrying Communist," no evidence was adduced at the hearing or the trial to this effect. Mr. Tavenner's testimony at the trial shows only that the Committee called the witness because he was an officer of the Union, but no testimony was offered that the Committee had evidence that he had been accused of Communism (*supra*, p. 16).

(12) The retributive and prosecutorial purpose of the hearing, finally, is illuminated by the Committee's highly personalized exploration of petitioner's past (*supra*, p. 13), the attack on his counsel (R. 223-225, 225-227, 288), the personal and ideological grilling of a physician who had furnished a medical excuse to a witness (R. 395-400), and the hectoring of a witness because he considered the Court a safer guide than the Committee and refused to confirm the Committee's notions of how his local union was run or to acquiesce in its insistence that Communists should not be tolerated in employment or union office (R. 227-241).

The subcommittee Chairman's meager and unparticularized announcement about the alleged purpose of the hearing (*supra*, p. 12) can hardly overcome the massive evidence of an improper purpose or give rise to an inference that the repeated official acts and statements indicating an exposure purpose were expressions of "motive" incidental to some legitimate endeavor.[40]

The Government has sought to minimize the significance of the pre-hearing evidence of an exposure purpose by ap-

[40] Even if the subcommittee Chairman's bare statement of the matter under inquiry created a presumption, it is not irrebuttable. *United States* v. *Cross*, 170 F. Supp. 303, 308-309 (D. C. D. C.).

plying to the investigative process the wholly inapplicable criteria of statutory interpretation. But, as we have pointed out, the ends of an investigation are determined in far less rigid and formalized ways than those of a statute. What cannot be disputed is the key role of the committee Chairman in determining the goals of legislative investigations.

Under the Rules of the Committee (Rule III), the Chairman is responsible for the issuance of subpoenas. He created the subcommittee (*supra*, p. 30). Chairman Walter considered himself the Committee's responsible spokesman. *Yellin* v. *United States, supra,* and *Yellin* Record, pp. 145-154. Under the Rules of the House, the Chairman is regarded as the responsible head of the Committee. See Jefferson's *Manual,* Sections 317, 343, 415, 418, 672. To ignore the course of statements and acts by Chairman Walter in determining whether or not the Committee had a legislative purpose would mutilate the realities. The entire environment of the investigative process makes it glaringly clear that the Chairman of an investigating committee is *the* authoritative voice in determining its purpose and scope.

The purposes expressed by the Chairman to defame and injure petitioner and to break the Union were not merely left to the hearing. Here is a case in which even before the hearing began the Committee's power was used to accomplish an illegal purpose.[41]

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[41] Contrary to the Government's contention that the newspaper clippings upon which we rely are ineffective to prove purpose, we assert that they are peculiarly probative of exposure. If Congressman Walter had merely issued a press release stating that "we" intend to break the Union and to demonstrate that petitioner is a card-carrying Communist upon whom the community is invited to take reprisal, such a press release would be a powerful demon-

The hearing broadened the Committee's punitive purpose to include the purge of all suspected union leaders (not just petitioner) from all Committee-proscribed labor organizations (not just the Union). Indeed, it is impossible to read the hearing record without becoming aware that the premise for the hearing is a statute—passed by the Committee but not by Congress—which condemns certain unions as subversive and seeks a purge of their leadership through exposure sanctions. The "probable cause" which brought petitioner to the witness stand was not his possession of legislatively useful information but his suspected violation of the Committee's home-made statute.[42]

Chairman Walter's "new plan", the pre-hearing attacks on petitioner and the Union and the hearing itself, these

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stration of the Committee's purpose. Here, the Chairman went beyond issuing a press release; he instigated the actual publication of the same information in newspapers in the very communities where the injury was to be done. In short, the newspaper clippings are not only evidence of an illegitimate purpose, but constitute an actual attempt to carry out that purpose.

[42] For a recent and highly revealing version of this invented statute, see the statement of Committee Chairman Willis on the difference between the way the Committee enforces the "Communist infiltration" ("we follow these Communists wherever they go") and "Communist control" ("the organization as such" is investigated) portions of the statute. The fact that Congress in fact has enacted a statute dealing with these matters is no embarrassment to the Committee but rather a "guide", a safeguard which should allay the fears of critics! Cong. Rec. April 14, 1965 (Daily Ed.) p. 7745. It is as though the House Labor and Education Committee proceeded to expose employers who engage in unfair labor practices and defended its unorthodox investigative endeavors on the ground that after all it had the guide of the National Labor Relations Act to keep it from straying.

Another unintentional admission of the exposure charges of its critics is the Committee's insistence that it never asks a witness whether he is a Communist unless it has solid evidence in its files that he is in fact a Communist. Cong. Rec. January 27, 1966 (Daily Ed.) pp. 1274-1275.

are all parts of a coherent and mutually supporting program for the enforcement of this statute. But the Committee could not use its power to "enact" such a statute, to "prosecute" those thought to be in violation of it and to pronounce them guilty. See *supra*, p. 56.

The Committee not only encroached on the proper spheres of the Executive and the Judiciary but the statute which it "passed" competed with one actually enacted by Congress.

By the terms of the Communist Control Act of 1954, Congress delegated to the Attorney General the task of investigating unions and of proceeding before the Subversive Activities Control Board against those alleged to be dominated or infiltrated by Communists. Communist Control Act of 1954, P. L. 637, 66 Stat. 775, 50 USCA 781, 792(a). If the Union's leadership made it a threat to security, the investigative resources of the Attorney General were available to bring it to book.[43] The Committee held a hearing not to guide Congress in the discharge of its responsibilities in this legislatively exhausted area, but only to enable it more effectively to accomplish its punitive purpose.

Even if the overwhelming evidence to the contrary is ignored, and a faint gleam of legislative purpose is discerned, it can hardly be argued—in view of the statute passed in August 1954, only six months prior to the hearing—that the need of Congress was so pressing as to justify

[43] Indeed, a petition was filed against the Union under the statute on December 20, 1955. After a lengthy hearing the Department of Justice moved to dismiss because it was unable to establish the allegations of the petition and the Subversive Activities Control Board dismissed the petition on March 30, 1959. See *Rogers v. United Electrical, Radio and Machine Workers of America*, Docket No. 119-56, Subversive Activities Control Board.

the invasion of the right of privacy." In *Barenblatt* (*supra*, at 112) the Court noted that, "The power [of inquiry] and the right of resistance to it are to be judged in the concrete, not on the basis of abstractions." And in *Watkins* the Court in repeating the *Kilbourn* ruling making the investigation of private affairs conditional on the existence of a legislative purpose (*Watkins, supra*, at 198) did not automatically justify an invasion of individual privacy. The opinion makes it clear (*ibid.*) that the permissibility of such invasions turns on "the existence of, and the weight to be ascribed to, the interest of the Congress in demanding disclosures from an unwilling witness." [46]

In any event this is not a case of a mere abuse of a valid power on the one hand and an invasion of privacy on the other. The Court is faced here with an unmistakable usurpation of power. The fact that the questions in issue could have been asked pursuant to a valid purpose is irrelevant. As was pointed out in *United States* v. *Icardi*, 140 F. Supp. 383, 388 (D. C.), "If the committee is not pursuing a *bona fide* legislative purpose when it secures the testimony of any witness, it is not acting as a 'competent tribunal' even though that very testimony is relevant to a matter that could be the subject of a valid legislative investigation."

If the Court's strictures (*supra*, pp. 53-55) against investigative exposure for exposure's sake are not to be reduced to empty verbalisms then the ruling below that this was not an exposure hearing cannot stand. Not only is there multi-faceted evidence of improper purpose but

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[46] With petitioner's First Amendment rights we deal below.

[47] See Redlich, "Rights of Witnesses Before Congressional Committees", 36 N. Y. U. Law Rev. 1126, 1148.

the presumption which normally shelters a legislative enterprise was overcome, as we have seen, in the very cradle of this "investigation." And, there is present here the evidence "that the Subcommittee was attempting to pillory witnesses" found to be lacking in *Barenblatt* (360 U. S. at 134); cf. *Braden* v. *United States*, 365 U. S. 431; *Wilkinson* v. *United States*, *supra*. If petitioner's showing in this case falls short of what is required, then we doubt whether an exposure purpose can be shown in any case, or indeed whether the purpose of the Committee can be viewed as a question of fact at all.

V.

The Committee's authorizing resolution is invalid because as construed and applied by the Committee it exceeds the legislative power and violates the principle of separation of powers.

While the Committee revealed its exposure purpose here with extraordinary clarity, the Committee's use of exposure as an investigative goal is hardly peculiar to this case. Indeed the Committee has throughout its existence construed its authorizing resolution as an exposure mandate. The transformation of its jurisdiction from investigation is apparent from masses of evidence which have accumulated during the twenty-eight years of the Committee's functions —twenty-one of them as a standing committee—and not only reinforces our contention that exposure activated the hearing but independently condemns the authorizing resolution itself as an unconstitutional usurpation of power.

The fact is that the Committee, in theory a servant of Congress, has made itself master of its own house. It has

become a fourth branch of government, exercising a miscellany of powers: legislative, in that it sets permissible standards of political behavior; executive, in that it charges violations of these standards, and judicial, in that it passes judgment on the guilty and "clears" the innocent.

The Committee has openly proclaimed that its special, unique function is exposure[46]—although in recent years it has been careful to recite for the record a claimed legislative purpose at the beginning of its hearings. The way in which the Committee has distorted the investigative process and usurped governmental powers in pursuance of its exposure purposes may be gleaned from the following summary of its method of operation:

1. Although the Committee is both a standing and an investigating committee, few bills are referred to it, and its legislative work is minimal. Of the 12,829 bills introduced in the House in the 88th Congress, only 32 were referred to the Committee. And of these 32 eighteen were similar or identical.[47] Similarly, of the 11,856 bills introduced in the House in 1965, thirteen bills (of which ten were identical)[48] were referred to the Committee. When bills are referred to the Committee, legislative hearings rarely re-

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[46] See *Barenblatt* v. *United States* (*supra*, at 156, note 6, 163-166; dissenting opinion); R. 169, 170, 171, 172, 173, 174, 175, 178, 179.

[47] Cong. Rec. (Daily Ed.) April 13, 1965, p. 7719.

[48] Cong. Rec. (Daily Ed.) Jan. 27, 1966, p. 1273; in the 83rd Congress, of the 10,285 bills referred to all House committees, four were referred to the Committee; in the 84th, of 12,456 bills referred to all House committees, only one was referred to the Committee and in the 85th, 13,521 bills were referred to House committees of which five were referred to the Committee. See Library of Congress, Legislative Reference Service, Digest of Public Bills, Final Issues for 1953-1958, inclusive.

sult: From 1950 to 1959 the Committee did not hold a single hearing on any specific bill.[49] It is hardly surprising that throughout its entire existence, the Committee is responsible for only three pieces of legislation. They are, the Internal Security of 1950, an amendment to it correcting an error made by the Committee, and a 1964 authorizing summary dismissal of employees of the National Security Agency. Cong. Rec. (Daily Ed.) April 13, 1965, p. 7719.

2. While the Committee is legislatively inactive, it is investigatively hyperactive. In 1965 the Committee staff director reported that it had published "more than 500 volumes of hearings, reports and consultations."[50] The enormous imbalance between the Committee's investigative and legislative activity supplies a revealing clue to the workings of the Committee.

3. The meager input of bills to the Committee and the limited output of legislation reflect the obvious fact that truly "legislative" problems falling within the Committee's jurisdiction are relatively rare; the members of the House have far greater need for the legislative assistance of the Judiciary and Agriculture Committees for example because these committees deal with problems which are more numerous, recurrent and important. The Committee thus "investigates" far more intensively than the latter committees not because there is a greater Congressional need for its investigative services. The Committee's investigative hyperactivity results from the fact that it has abandoned its role as a legislative aide of Congress and independently

[49] Cong. Rec. (Daily Ed.) April 13, 1965, p. 7719.

[50] Cong. Rec. (Daily Ed.) February 8, 1965, p. 2088.

entered a field, exposure, which is not confined to the limitations of the Congressional investigative function.

4. The key to the Committee's exposure functions is its concern with people rather than problems.[51] An investigation comes into being not because of the need to probe a particular issue or problem but because names of past, present or suspected Communists have been made known to it by an ex-FBI informer who has "surfaced" or a recanted Communist.[51a] Though in form a hearing, Committee proceedings are disguised trials in which the "friendly" informer witness is the accuser and the unfriendly witness the defendant.

5. Whenever the Committee acquires a sufficient supply of names, it holds a hearing. Whether the hearing is designated by an "area", "organization" or "subject matter" title the hearing itself concentrates on establishing the politically discreditable characteristics of the witness.

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[51] R. 142, 143-144, 149-150, 151-152, 154, 155, 157, 157-158, 160, 161, 165, 166.

[51a] See, for example, *Newark Area* (1955) 993 (we will refer in this abbreviated way throughout to Committee hearings):

> "During the course of the investigation by our trained and experienced staff, prior to these Newark hearings, the committee has been most fortunate in obtaining cooperation and sworn testimony in executive session of an individual who for many years served as undercover agent in the Newark area for the Federal Bureau of Investigation.
>
> "During the course of this person's service with the Department of Justice he was able to ascertain the identity of a great many individuals who were active in the Communist Party in Newark and the Newark area."
>
> . . .
>
> "This witness alone identified approximately 75 Newark individuals who were active in . . . the Communist Party during the witness' period of service to our Government as an FBI agent."

It is thus the availability of potential exposable witnesses alone that is the measure of the Committee's investigative productivity. The Committee of course could hold hearings without using its subpoena power in order to investigate the factual disclosures of friendly witnesses —but it rarely does so.

6. The need for a constant flow of names accounts for the Committee's curious exhaustiveness. Everyone—butcher, baker and candlestick maker, preachers and housewives—suspected by the Committee must be summoned. In some instances, the exposure process has victimized the same individual a number of times. Those not yet subpoenaed live in fear and await their turn. It is this exhaustiveness which so clearly reveals the Committee's usurpation of law-enforcement functions (see *supra*, pp. 55-56). And of course the fact that an individual's political associations automatically make him exposable is hardly an assurance that he possesses information which may be of use to Congress.

7. The imperatives of the Committee's exposure function drive it into a quest for witnesses with Left ties in the ever remote past. The Committee tirelessly hunts down ex-Communists and depression radicals to swell the number of exposable witnesses.[32] But again these are questionable sources of information about current Communist Party activities.

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[32] No fewer than ten witnesses called to Committee hearings during the 85th Congress had left the Communist Party prior to 1941. *Hearings*, 414 ff, 762 ff, 824 ff, 833 ff, 880 ff, 1410 ff, 1432 ff, 1448 ff, 1445 ff, 1461 ff.

8. Because names are the Committee's life-blood, it inevitably tries to force the would-be co-operative witness to name others. Witnesses who plead with the Committee to waive this requirement so that they can be "cleared" as friendly are invariably refused even though they promise full disclosure of their own activities. The unwillingness to act as an informer thus compels the witness to refuse to cooperate altogether.[53] This is no great loss to the Committee. The facts which the witness offers to share about his own activities are not important to the Committee, even though it might be to Congress. But the names are vital to the exposure process.

9. More than eighty percent of the "testimony" before the Committee consists of the refusals of witnesses to testify and supporting explanations and pleas.[54] The Committee knows (or can easily find out) whether or not a prospective witness will testify. But the Committee cherishes silent witnesses; they are precisely the ones who must be exposed and punished. The compulsory disclosure of the witness' politics is not a means to a disclosure of other facts, but an end in itself. It is a destination, not a journey. Thus

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[53] *Chicago Area* (1959) 622-631; *Philadelphia Area* (1953) 2973-2981; *Philadelphia Area* (1954) 3944; *Radiation Laboratory* (1950) 3428; *Deutch* v. *United States, supra; Watkins* v. *United States, supra; Silber* v. *United States, supra;* Emerson and Haber, *Political and Civil Rights in the United States* (2d Ed.) 737.

[54] See note 58, *infra*. At every hearing there are many more unfriendly witnesses than cooperative ones. In the 84th Congress, the Committee called a total of 529 witnesses. Of these, 464 were unfriendly and gave the Committee no information. The remainder were either Government officials (15), former FBI agents (22) or persons who had left the Communist Party (28). In the 85th Congress, of a total of 402 witnesses, 331 were unfriendly. The friendly witnesses included 11 former undercover agents and 18 ex-Communists.

when recalcitrant witnesses recant and reappear before the Committee (see *Barenblatt, supra,* at 156-157 dissenting opinion) they are, for the most part, asked not factual questions but are required to name others.[55]

10. In can be seen from the above that exposure is actually parasitic on the Congressional investigation function, that it pursues a course that frustrates a legitimate Congressional need for useful facts. And the facts which do seep through the hearings are repeated over and over again. This is so because the witnesses, who have after all shared the same experience[56] give the same testimony (and submit the same documents) about claimed the subjects of Committee concern—Communist Party structure and Communist "fronts", activities in education, labor and youth, etc.[57] All that changes are the lists of names. And repetition is compounded when the friendly witness is put on the stand for repeat performances in order to ventilate additional names or at a hearing in another city.[58] The few

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[55] For six examples of this see Beck, *Contempt of Congress* (1959), p. 184, note 6.

[56] Not infrequently they name one another. See, for example, *Barenblatt, supra,* note 57 (dissenting opinion) and *Buffalo Area* (1964) 1561.

[57] A noteworthy aspect of the exposure system is the fact that the testimony adduced in the hearings about the subjects under inquiry invariably comes from ex-Communists under pressure, chronic witnesses and informers, dubious sources of fact for the aid of Congress. For all of the voluminous published hearings of which the Committee boasts *(supra),* the Committee has never troubled to make available to Congress a truly objective body of facts relating to the problems of the national security and its endlessly proliferating hearings are totally barren of scholarly or informed testimony on this subject.

[58] The friendly witness Cvetic testified before the Committee four times (*Western Pennsylvania* (1950) 1195-1352, 3007, 3029,

meaningful facts that can be isolated in the hearing are buried under a mountain of names.[59]

11. In order to ensure the maximum injury to the witness, the Committee invariably requires him to appear at a public session. The Committee uses the executive session primarily for the purpose of determining how best to in-

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3143); John Lautner testified on ten separate occasions between the 84th and 86th Congresses (*Supplement to Cumulative Index to Publications of the Committee on Un-American Activities,* 187; Barbara Hartle was likewise a prolific testifier with four appearances (*op. cit.* p. 141; *Pacific Northwest* (Seattle 1954) 6051-6125; (Portland 1954) 6629-6650) between 1954 and 1960; in four days of testimony, Mrs. Mildred Blauvelt, a "red squad" agent of the New York City Police force supplied the Committee with the names, and in most cases, the addresses of 450 people (*New York City* (1955) 820-989. She gave further testimony along the same lines in the 1955 *Los Angeles* hearings (1526-1537, 1668-1676).

On the duplication of testimony, compare the testimony of Golden (*Greater Pittsburgh Area,* 1959) 320-345, 367-369; Holmes (*Chicago Area,* 1965) 331-383; Berecz (*Buffalo Area,* 1964) 1531-1561; Withrow (*Minneapolis Area,* 1964) 1690-1751; Penha (*New England Area,* 1958) 2090-2933 and Prussion (*Northern California,* 1960) 2031-2065 and compare the documents concerning the Communist Party's 17th National Convention in the Appendix to *Northern California District* (Part 4, 1960) with those contained in *Chicago Area* (Part 2, 1965). This constant rehashing of the same material by the Committee is a travesty of investigative fact-gathering.

[59] The Committee's obsession with names at the expense of its Congressional responsibility to investigate facts is no more graphically illustrated than in its colossal "Cumulative Index to Publications" which purports to break down into a usable index form the Committee's work from 1938 through 1954. It consists entirely of alphabetical lists of the names of individuals, publications and organizations. The "Supplement to Cumulative Index" (1955-1960) follows the same pattern but adds a subject matter index to a Committee publication on Russian Communism. The hearings are nowhere indexed and it may well be that the Committee has concluded that there is nothing to index. The Committee does not explain how an index of names serves the legislative needs of Congress.

jure the witness. The fact that the witness has already testified *in camera* does not save him from a public appearance. The public session facilitates his exposure as well as the exposure of those whom he is required to name.[60]

12. The public exposure hearing operates through a dual process of public identification of the victim and the stimulation of group and individual economic, social and political sanctions against him so that he will be discharged and permanently blacklisted, his career and reputation destroyed, his social and family relationships ruined and his

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[60] See the *Yellin*, *Grumman* and *Silber* cases, *supra*; *Chicago Area* (1965), *passim*. When the Committee obtain names from a friendly witness in executive session, it adduces the names again in public session. For example, *Communications Infiltration* (1957) 1510:

"Mr. Arens: Now during the course of your membership in the Communist Party did you know a number of people as Communists who were engaged in the communications field?

Mrs. Greenberg: I did.

Mr. Arens: Have you conferred with myself and with other members of the staff with reference to the facts as you have known them?

Mrs. Greenberg: Yes, sir.

Mr. Arens: Do you have before you now a list of names of persons that you have given to the staff here, persons known by you to a certainty to have been members of the Communist Party?

Mrs. Greenberg: I have.

Mr. Arens: As to each of these persons, have you served with him or her in a closed Communist Party meeting?

Mrs. Greenberg: I have.

Mr. Arens: Would you kindly tell us the name of each of these persons, and give us just a word of description concerning each one of them."

Newark Area (1958) 2763:

"My name is Kate Heck, and I live in Newark, N. J. As to my occupation, I am now unemployed as a direct result of this committee. I was called before an executive session. I

children shunned.[61] The Committee seeks to achieve its purposes by attributing to the witness views and affiliations—political, trade union, organizational—which it equates with such fear-engendering crimes as treason, plotting, espionage and sabotage. In order to guarantee results, the Committee collaborates with those in the community who share its views to inspire in the rest of the community sufficient hostility to the victim to do its bidding. An exposed witness suffers an invasion of his constitutional rights; he is also isolated from the moral and ethical protections of his society.

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appeared there and I was subpoenaed to an open hearing; and when I so informed my employers, I lost my job."

[61] R. 143, 150-151, 154, 156, 164, 167-168, 180-181.
The 1951 Annual Report of the Committee states:

"It was the hope of this committee, after having conducted the 1947 hearings, that the motion-picture industry would accept the initiative and take positive and determined steps to check communism within the industry . . . The committee pursued its established policy that whenever it is obvious that a responsible group, whether in industry, labor or independent organization, does not perform its duty in guarding itself against Communist influence, then the committee must expose this defect. So it was with the motion-picture industry . . . If Communism in Hollywood is now mythical, it is only because this committee conducted three investigations to bring it about. The industry itself certainly did not accomplish this." H. Rep. No. 2431, 82nd Cong., 2d Sess., pp. 2, 8.

See also *Los Angeles Professional Groups* (1952), 4116; Barth, *Loyalty of Free Men* (1951) 70-71; *Some Illustrations of the Harms Done to Individuals By the House Un-American Activities Committee*, American Civil Liberties Union, July 28, 1961.
The exposure process also welcomes initiative from private sources:

"The committee has formulated the policy of investigating complaints received from American citizens who have the interest of the United States foremost in their hearts and minds. In

13. In furtherance of the collaboration referred to above the Committee elicits details about the witness' life, residence, occupation and place of work.[92] Congress has no need for these facts, but they help zealots in the community, in Chairman Walter's words, "do the rest." The

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each instance the committee has undertaken an investigation only upon complaints by citizens." 79th Cong., 2d Sess., H. Rept. 2233.

When the Committee demanded the radio scripts of selected news commentators, Representative Landis declared:

"As a public agency we are compelled to respect a reasonable request from substantial citizens." 92 C. R. A3149 (1946).

The Committee's request that American institutions of higher learning submit textbook lists was justified on the grounds that the investigation was requested by the National Council of the Sons of the American Revolution. Carr, *House Committee on Un-American Activities* (1952) 283. See also *Dayton Area* (1954) 6802.

[92] The following exchanges are typical:

"Mr. Moulder: Where is your office located from which you engage in the practice of law?

Mr. Steinmetz: In the city of Los Angeles.

Mr. Moulder: In what building and what office number?

Mr. Steinmetz: Does that have any pertinency? * * *

Mr. Moulder: To properly identify you, as to who you are. We are trying to designate as to just exactly who you are.

Mr. Steinmetz: I believe it is in the telegram as correctly stated there, Mr. Moulder. That is the telegram which I received summoning me to this postponed hearing.

Mr. Moulder: Then do you refuse to answer that question?

Mr. Steinmetz: Well my address, as I say, is correctly stated in the telegram, I believe you have a copy."

(Witness answers question) *Los Angeles Professional Groups* (1952) 3912.

* * *

Mr. Kunzig: What is your address, Professor?

Mr. Glasser: My mailing address, the record may show, is * * *. I am not giving my home address. I think you want identification of a mailing address. * * *

Mr. Kunzig: I would like to ask for your home address, and I hereby ask your home address. * * *

(footnote continued on following page)

need to ensure that the exposure will "take" also explains the Committee's partiality for "on location" hearings. Since 1950, the Committee has held hearings in more than 25 different American cities (and in some of them three or four times). It is this need also that causes the Committee to lean so heavily on the press and the mass media.[43]

14. The exposure system not only has its "law side" but it also has its "equity side." The Committee uses its power officially to "clear" witnesses who find themselves unemployable because they have previously been exposed. Organizations also are offered similar relief when they become acceptable to the Committee.[44]

Mr. Doyle: Mr. Chairman, this witness is the same as any other American citizen, and we are entitled to have his residence address, and I ask that it be given.

* * *

Mr. Velde: Yes, the Chair decides or feels very definitely there is no reason why you should refuse your home address, and I direct you to answer that question, Professor.

Mr. Glasser: I will answer it, sir. I am going to answer it under protest, my reason being fear of harassment.

Mr. Clardy: Mr. Chairman, may I ask that he be instructed to proceed with the answering and stop making speeches."

Infiltration—Education (1953) 181-182

See also 2 *New York City Area* (1953) 1245, witness refuses address because on a previous occasion "we had many anti-Semitic letters;" *New York City Area* (1953) 2005, witness required to give address publicly after requesting that it be taken in executive session, witness explaining, "We have been molested every time there was such a hearing;" * * * "I have small children and we have been molested by some hoodlums," *ibid.; Infiltration-Government* (1952) 3346, 3352; *Detroit Area* (1952) 2805-2806; *Buffalo Area* (1964) 1569.

[43] *Supra*, pp. 7-10; Carr, *The House Committee on Un-American Activities* (1952) 139, 174, 391-392; *Washington Post*, April 5, 1953, "A Velde 'File' Dissected" and *New York Times*, July 20, 1953, "Sherrill Protests Inquiry Procedure."

[44] R. 145, 146, 162-163 and *James H. Robinson* (1964).

15. In order to make effective its exposure activities, the Committee engages in a variety of related, non-legislative operations:

(a) The Committee condemns organizations as subversive without hearings in order to discredit their activities and to supply its collaborators with the raw materials for judging, injuring and blacklisting Americans because of their membership in these organizations. See *infra*, pp. 115-118.

(b) The Committee publishes an ever-increasing stream of propaganda which has no relationship to the legislative process but which promotes fear and hate, so essential to the operation of the exposure system.[65]

(c) The Committee maintains an elaborate system of dossiers. These dossiers are made available to the

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[65] An examination of the Committee's Annual Reports reveals the fact that the Committee is the sponsor or publisher of an ever-growing stream of reports, documents, surveys, "consultations" which are not based on the hearings, are not House reports and indeed are not legislative at all, but are the Committee's own propaganda in support of its political views. The following are a few titles as set forth in the Committee's Annual Reports for 1956, p. 65 ("The Great Pretense", "The Communist Conspiracy, Part I", "Soviet Total War"); 1957, p. 7 ("International Communism", "Ideological Fallacies of Communism"); 1958, p. 81 ("Communist Program for World Conquest", "The Irrationality of Communism"); 1959, pp. 117-118 ("Language As A Communist Weapon", "The Crimes of Khrushchev, Part I-IV", "Who Are They?—Karl Marx"); 1960, pp. 113-114 ("Lest We Forget", "Communist Economic Warfare"); 1961, p. 184 ("Manipulation of Public Opinion"); 1962, p. 87 ("Communist Party's Cold War Against Congressional Investigation of Subversion"); 1963, p. 118 ("World Communist Movement: Selective Chronology", Vol. II); 1964, p. 65 ("World Communist Movement: Selective Chronology", Vol. III).

This non-legislative output, together with the name-indexed hearings, House reports and indices, is circulated in enormous quantities:

(footnote continued on following page)

Committee's supporters, either directly or through their Congressmen, for the purpose of enabling the Committee's supporters or collaborators to maintain surveillance over political suspects and to do them injury with officially sanctioned weapons.[66] The dossiers are supplemented by huge published indices of names.

Year		*Copies Circulated*	
1957	(Annual Report, 6)	501,000	
1958	(80)	524,000	
1959	(117)	650,000	
1960	(113)	332,000	(plus "thousands of other documents")
1961	(183)	508,000	
1962	(87)	541,250	
1963	(118)	252,465	
1964	(65)	206,480	

The Committee has secured authorizations, among others, for the printing of 1,500,000 (H. Con. Res. 52, 81st Cong., 1st Sess.), 540,000 (H. Con. Res. 98, 99, 82nd Cong., 1st Sess.) and 84,500 copies (H. Res'ns 168, 169, 170, 187, 228, 258, 86th Cong., 1st Sess.) of its publications.

These publications are used to validate extremist politics (e.g. Stormer, *None Dare Call It Treason* (1964)) or to handicap the achievement of important national goals. See Cook, *The Segregationists* (1962) *passim*.

The hearings themselves are widely circulated in order to implement the Committee's exposure aims. See, for example, the following statement of Chairman Velde in *Chicago Area* (1954) 4255:

> "Of course, we have had a great many hearings all throughout the country dealing with the subject of communism and the labor union movement. We have had a lot of our hearings printed, pamphlets, so that members in the Communist-dominated unions should know that we have the information and should be willing to read the information that is furnished free of charge in most instances by the Federal Government."

See also Comment, *Legislative Inquiry into Political Activity*, 65 Yale L. J. 1159, 1161; Cushman, *Civil Liberties in the United States* (1956) 195-196.

[66] R. 136-141, 142, 176, 146-149, 158, 167. As early as 1952, it was estimated that the Committee had accumulated about one million political dossiers. Carr, *op. cit.* 254. The file service is intensively used to discredit individuals and organizations, to

The Committee, it must be emphasized, has not temporarily lapsed into an invalid application of its charter in this case. The Committee has erected upon its mandate a unique governmental power system, not only in conflict with the legislative role which alone can justify its existence but fundamentally irreconcilable with the principle of separation of powers upon which our Government rests.

Nor does asserted House approval redeem Rule XI or justify the new kind of governmental power which the Committee has developed through it. In *Barenblatt, supra*, at 117-121, the Court rejected a contention that Rule XI was too vague and general to justify the investigation there in issue. The Court acknowledged the vagueness of the Rule, but found that historically the Rule had been interpreted by the Committee to apply to Communism and the activities of the Communist Party, that Congress had acquiesced in and ratified this construction of the Rule and that as construed in this limited way the Rule adequately supported the use of compulsory process in a probe of "Communist activities" in education. But, as we have shown, the Committee characteristically investigates "Communist activities" through exposure, not fact-gathering; that is, by taking from the witness what the Committee has no right to

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legitimize private sanctions and as a supplement to investigative exposure. See for example Cook's *The Ugly Truth About the NAACP* (n.d.; based on Congressional disclosures of the Committee dossiers of NAACP leaders) and Lowman (Circuit Riders), "The Public Records of 2109 Methodist Ministers" (1960); Lowman (Circuit Riders), "The Public Records of 658 Clergymen and Laymen Connected With the National Council of Churches" (1962). And from the same source: "6000 Educators" (1959), "660 Baptist Clergymen", "30 of 95 Men Who Gave Us the Revised Standard Version of the Bible."

claim—his privacy, personal freedom, livelihood and good name—and denying to Congress what it needs—facts to aid in the legislative process. Thus, what the Court in *Barenblatt* thought was a cure—specificity—for the conceded vagueness of the Rule is as constitutionally objectionable as the disease itself. The narrowed construction of the Rule is simply a license by the House to the Committee to expose Communists, ex-Communists and suspected Communists "wherever they may be found."[47]

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[47] The Court's limiting gloss in *Barenblatt* and its conclusion with respect to the ratification by the House of the gloss involves the very abstraction against which the Court in that case cautioned. Thus, it cannot fairly be said that the House, either through appropriations approval or contempt citations (see Beck, *op. cit.*, pp. 56, 84, 114, 138-140, 142, 151-152, 185) is adequately apprised of what the Committee does. To be sure, the House bestows a wholesale approval on the Committee's pervasive activities as a result of annual appropriation grants but particular investigations are not supervised and controlled with the same care and intensity as investigations with subpoena power in other areas (see *supra*, note 11). *There is no other standing committee which is at once so profligate in its use of the subpoena power and so free of either preliminary or final control by the parent branch of Congress.*

Moreover, as we point out below, the Court in *Barenblatt* was considering only the contention that the Rule is too general to justify the inquiry involved there, not "First Amendment vagueness," the restraint on free speech and self-censorship resulting from the vagueness of the Rule. In addition, the Court did not find it necessary to deal with the extremely loose way in which the Committee has always defined Communism and Communist activities (see *infra*, pp. 110-114). Nor did the Court take into account the way in which the Committee's application of the Rule invades the freedoms of a wide variety of organizations and publications on the ground that they do not bar Communists from membership, share some Communist objective or demonstrate in their activities some proscribed degree of consanguinity to the Communist parent stock. (See *infra*, pp. 115-118.) Finally, it seems to us, that the Court's "Communism" resolution of the Rule's ambiguity cannot be squared with the Committee's investigation of the Ku Klux Klan. See *infra*, p. 114.

If a statute were enacted merely requiring the registration of the class around which, according to *Barenblatt*, the Rule as construed draws a circle and subjects to compulsory process, it would be unconstitutional. And here is no mere registration, but a highly punitive form of compulsory identification. Cf. *United States* v. *Brown*, *supra*.

The Court, it seems to us, cannot salvage the Rule. It cannot be enforced as written through compulsory process for reasons made clear in *Watkins*, *supra*. Neither can it be enforced within the rewritten limits and narrow compass of the *Barenblatt* "Communism" gloss. We are dealing with a direction by Congress to one of its committees, an area which, as the Court noted in *Watkins*, *supra*, at 205, is "peculiarly within the realm of the legislature." It would therefore seem inappropriate for the Court now to provide another limiting construction.

And even if Rule XI could be further patched so as to repair its facial evils of vagueness and overbreadth on the one hand and the evils, in application, of specification and identification on the other, a threat to the protected freedoms would remain, for the Rule makes communication its target. If the Congress needs to be informed in this area, it "is free to determine the kinds of data that should be collected." If compulsory process is thought to be necessary, "a measure of added care" by the House is required in drafting a new authorization. *Watkins*, *supra*, at 215. But constitutional life can no longer be breathed into Rule XI.

VI.

The conviction rests upon an attainder proceeding prohibited by Article I, Section 9, Clause 3 of the Constitution.

A bill of attainder is a legislative judgment without trial. See *United States* v. *Lovett*, 328 U. S. 303; *Ex parte Garland*, 4 Wall. 333; *Cummings* v. *Missouri*, 4 Wall. 277; *United States* v. *Brown*, *supra*.

Exposure is a form of attainder in which a judgment of subversion is handed down by the Committee against an individual witness without trial. The present case is an unusually compelling example of attainder because not only was the *effect* of the proceeding to impose a punishment upon petitioner, but that was its clearly-expressed *purpose*. The Chairman of the Committee stated that the purpose of committee's power was to expose him and to break the Union (*supra*, pp. 7-10). The subcommittee avowedly used the hearing to reinforce this objective. More particularly, the purpose and the effect of the hearing was (a) to punish; (b) without trial; (c) an identified individual; (d) for political acts; (e) committed in the past. This form of action by a legislature is unmistakably an attainder under Article 1, Section 9, Clause 3 of the Constitution. It matters not at all that the action complained of here was that of an agent of Congress rather than that of the Congress as a whole, as in the *Lovett* case, *supra*.[48] In *Cummings* v.

[48] It is significant that the Lovett attainder arose from charges of subversion against Lovett and his colleagues by the Special Committee on Un-American Activities and its Chairman. See *Barenblatt*, *supra*, at 155 (dissenting opinion); 89 Cong. Rec. 479-486.

Missouri, supra, at 325, the Court used language which is directly applicable here:

> "The Constitution deals with substance, not shadows. Its inhibition was levelled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding."

Confronted with Communist disclaimer affidavits which had not been challenged and impatient with the workings of the statute which had been passed to deal with its claimed concern, the Committee acted because it feared that if it did not punish petitioner he might escape all punishment. This need to improvise a punishment against politically unpopular individuals where no legitimate punishment is available explains the *Test Oath* attainders as well as the *Lovett* attainder. The Committee resolved its dilemma by creating an offense, putting petitioner on trial, determining his guilt, and inflicting a punishment which it deemed commensurate with its gravity. In the language of the *Cummings* case (4 Wall., at 320) the use of the Committee's power "was required to reach the person, not the calling."

There can be no question that the intended sanctions of exposure and disqualification for union office each separately constitutes a punishment in the attainder sense.

Involved here is no mere neutral disclosure of petitioner's politics (see our discussion of the invasion of petitioner's First Amendment rights below), but rather a judgment that

the petitioner was guilty of "subversion." And beyond this the attachment to petitioner of a visible badge of infamy which could be used to legitimize private sanctions against petitioner and the deprivation of his "rights, civil or political, previously enjoyed . . ." (4 Wall., at 320-321).

As Irving Brant has written of legislative exposure:[69]

> ". . . By smiting a man day after day with slanderous words, by taking away his opportunity to earn a living, you can drain the blood from his veins without even scratching his skin.
>
> "Today's bill of attainder is broader than the classic form, and not so tall and sharp. There is mental in place of physical torture, and confiscation of tomorrow's bread and butter instead of yesterday's land and gold."

And, of course, occupational disqualification of the politically unpopular[70] is the classic form of punishment by at-

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[69] Quoted in Mr. Justice Douglas' dissent in *Flemming* v. *Nestor*, 363 U. S. 603, 629. See also Brant, *Bill of Rights* (1965) Chapter 37, "Attainder by Congressional Committees," pp. 459-479; see also Note, *Punishment: Its Meaning in relation to Separation of Powers and Substantive Constitutional Restrictions And* Its Use *In the Lovett, Trop, Perez* and *Speiser* Cases, 34 Indiana Law J. 231, 234-249.

[70] All authorities agree that bills of attainder, from the earliest recorded instances of their use in England late in the 13th Century onward to their last brief but drastic phase during and at the close of the long quarrel between the Commons and the Stuarts, were a means of punishment of "political" offenders—usually persons of position and influence whose political views were obnoxious to the dominant party. See Creasy, E. S., *Rise and Progress of the English Constitution* (3d ed. 1856) p. 252; Adams, Geo. B., *Constitutional History of England* (Schuyler rev. 1934) pp. 228-229, 280; Naismith, *English Public Law* (1873) p. 153; Stephens, *History of Criminal Law of England* (1883) Vol. I, pp. 160-161; Anson, *Law and Customs of the Constitution* (5th ed. 1922) Vol. I, p. 362; Story, *Commentaries on the Constitution* (5th ed. 1891)

tainder. See the *Test Oath* cases, *Lovett's* case, *supra*, and *United States* v. *Brown, supra.*

The Court recently struck down an attainder against a union official. *United States* v. *Brown, supra.* The Court ruled (at 461) that Congress cannot "weed dangerous persons out of the labor movement" by "specify[ing] the people upon whom the sanction it prescribes is to be levied." It could only "accomplish such results by rules of general applicability." Thus the very objective which the Court held is forbidden to the Congress shaped the Committee's proceeding in this case.

It is only necessary to add that the attainder evil arises when passion and fear create pressures to punish unpopular minorities without resort to the established forms of law.[71] Attainder was used historically to strike at its vic-

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Sec. 1344; Medley, *English Constitutional History* (6th ed. rev. 1925) p. 167.

"Subverting the government" was a common charge in the late modern period. Notorious among the English attainders by Act of Parliament was that of Thomas Wentworth, Earl of Strafford, most faithful counsellor of Charles I, in 1641 (see note 72 *infra*) on the ground that he had endeavored "to subvert the ancient fundamental Laws and Government." 17 Car. I. *DeLolme on the Constitution* (1838 ed.) Vol. I, p. 400; Hume, *History of England* (Brewer ed. 1880) pp. 183 *et seq.;* Medley, *supra*, p. 167; Feilden, Henry, *Constitutional History of England* (4th ed. rev. 1911) p. 153. Similarly in 1645 a preliminary impeachment against Archbishop Laud was converted into an attainder for attempting to alter the religion and fundamental laws of the realm. Howell, *State Trials,* Vol. IV, 598, 599. In 1715, the "Jacobite" Lords Bolingbroke and Ormond were impeached for acts prejudicial to the national welfare, *i.e.*, their share in the peace of Utrecht, and later attainted on failing to surrender. 1 Geo. I. cc. 16, 17. Howell, *State Trials,* Vol. XV, 1002, 1012.

[71] The Court has traced the history of attainders in *United States* v. *Brown, supra,* and in *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123, 142.

times because no other legal way could be found to do so.[72] But the attainder evil cannot be viewed as confined to an unhappy far-off time. As Mr. Brant has written (op. cit. *supra*):

> "What is perfectly clear is that hate, fear and prejudice play the same role today, in the destruction of human rights in America that they did in England when a frenzied mob of lords, judges, bishops and shoemakers turned the Titus Oakes blacklist into a hangman's record. Hate, jealousy and spite continue to fill the legislative attainder lists just as they did in the Irish Parliament of ex-King James."

The present is history and exposure is the attainder of our time—the grave and frightening reflection of the breakdown in our legal protections which has resulted from the red hunts which have engulfed us.[73]

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[72] The Earl of Strafford was attainted of high treason "to Husband time" and to "obviate those Scruples and Delays, which through disuse of proceedings of this nature, might have risen in the manner and way of proceedings." Rushworth, *Strafford's Trial*, pp. 676-677.

[73] Before exposure became institutionalized as the modern form of attainder, the Congress experimented with variants of attainder imposed through its control over appropriations. See the 1924 War Department Appropriation Bill (H. R. 7877; 65 Cong. Rec. 5031-5032); Interior Department Appropriation Bill, 1930 (H. R. 4852), 84 Cong. Rec. 4308-4346; Emergency Relief Appropriation Bill, 1942, 87 Cong. Rec. 5110; Interior Department Appropriation Bill, 1941, 87 Cong. Rec. 4072; and see *Lovett, supra*. Another form of attainder was the attempt made in the House directly to deport Harry Bridges in June, 1940, H. R. 9766, 76th Cong. Sess. The bill passed the House, was reported to the Senate (S. Rep. No. 2031) but was not passed. A similar bill was introduced into the 77th Congress (H. R. 1644) and again passed the House, 87 Cong. Rec. 7675. All of the attainder attempts failed except that of Lovett, Watson and Dodd and David Lasser, 87 Cong. Rec. 5113.

VII.

The compelled disclosures in issue here invade rights protected by the First Amendment.

Even if the Committee had a valid legislative purpose (and the other contentions we have raised were without merit), the conviction could not stand.

It is no longer open to question that the compulsory disclosure of political affiliation and group association, of the kind involved here, constitutes an invasion of the First Amendment.[14] However, under the *Barenblatt* case, the

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[14] The enforced disclosure of affiliation and opinion is no insignificant or minor rupture in the fabric of our freedoms. The matrix of our entire system for protecting dissent is embedded in the anonymity which an impersonal urbanized culture has made possible. The individual's right to dissent was but an abstraction in a pre-industrialized culture when each man was at the mercy of his neighbor's prejudices. As John P. Roche put it in "American Liberty: An Examination of the 'Tradition of Freedom,'" *Aspects of Liberty*, Konvitz and Rossiter (eds.) (Cornell University Press, 1958), "In a very real sense the very impersonalization of urban life is a condition of freedom; it is quite possible to live differently and believe differently from one's neighbors without their knowing, much less caring, about the deviation." See Nye, *Fettered Freedom* (Michigan State College Press (1959)) for an account of liberty in America in the pre-industrial era.

The goal of the Committee's exposure system is nothing less than the restoration of the social and economic controls which gave dissent no quarter. And it is not the compulsion to answer which alone condemns interrogation in the area of political expression. The mere fact that the witness must make a public choice between answering the question and declining to answer it, improperly burdens the exercise of the right of political expression (cf. *Illinois ex rel. McCollum* v. *Board of Education*, 333 U. S. 203). The very inquiry whether a witness is a member of an organization officially branded as subversive exerts as discouraging an effect upon his freedom of choice and the freedom of others as, for example, the interrogation by an employer concerning the union affiliation of his employee. *International Assn. of Machinists* v. *N. L. R. B.*, 311 U. S. 72, 78, 80. And the refusal to answer would establish the witness' "non-cooperation with a congressional committee," in itself, whatever its motivation, a potent basis for community con-

vindication of those rights depends upon a balancing of "the competing private and public interests at stake in the particular circumstances shown." 363 U. S. at 126. In this case, as in *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449; *Bates* v. *Little Rock*, 361 U. S. 516, and *Gibson* v. *Florida*, 372 U. S. 539, the "circumstances shown" do not warrant a sacrifice of petitioner's First Amendment freedoms.

There was no overriding legislative purpose for the hearing, no legitimate reason for calling petitioner and no need for his testimony in that:

1. Even if the purpose of the hearing were technically legislative, it was not strong enough to override petitioner's First Amendment rights;

2. The Committee already had detailed information in its files about petitioner (*supra*, pp. 16-17);

3. For the five years prior to the date of his appearance petitioner had filed non-Communist affidavits pursuant to the Taft-Hartley Act (*supra*, p. 16) (*American Communications Assn.* v. *Douds*, 339 U. S. 382);

4. The proceeding was not based on "probable cause for belief that" petitioner "possessed information that might be helpful" to the Committee (*Barenblatt*, *supra*, 134) and no such cause was demonstrated either at the hearing or the trial;

5. The hearing resulted from "indiscriminate dragnet procedures" (*ibid.*) through which the entire leadership of the Union was being systematically subpoenaed.

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demnation. Such "non-cooperation" was, for a long time, a ground for discharge of professors enjoying tenure from most American universities and of employees from private employment. *New York Times*, December 10, 1953.

Moreover, quite apart from the above considerations which decisively subordinate the Committee's immediate concerns to petitioner's constitutionally-protected rights, a detailed analysis in a larger focus of the competing interests involved brought an expert, Professor Thomas I. Emerson of the Yale Law School, to the conclusion, under circumstances comparable to those present here (*supra*, p. 15):

> "that the interests of the Government in obtaining answers to the questions put to this defendant as an aid in developing further legislation to protect internal security are substantially outweighed by the interests of the individual in freedom of speech or silence, as he may prefer, and by the interests of the community in maintaining freedom of political expression and other conditions essential to maintaining an open society."

Invasion of the First Amendment rights of Committee witnesses has come to be mechanically justified on the grounds of national security in every investigation involving Communism. But the facts upon which such justifications are based are stale and require authoritative reevaluation. It is simply a myth that our security is under a threat of internal subversion of such menacing proportions as to require the continuing curtailment of our freedoms for the indefinite future. The fact is that the power of Communism in the United States is now and has for some time been at an extremely low ebb. See Emerson testimony, *supra*. Nor can it be convincingly argued that there is a foreign threat which justifies curtailment of domestic freedoms. The collapse of the myth of a monolithic Communist world, the emergence of polycentrism, the rivalry of the Soviet and Chinese systems and the development of mutually shared goals of co-existence between the United States

and the Soviet Union—all of these circumstances condemn as unreal the justifications for restraints on our basic freedoms which have hitherto been advanced."[15]

The reasons which, in *Barenblatt*, were brought to the support of the constitutionality of compulsory disclosures in this area are anachronistic."[16] It is true that for the Committee the more things change politically, the more they remain the same investigatively. But the Committee's ritualistic anti-Communism is of no help here. Even in the case of commercial regulations the Court evaluates the reasonableness of a restraint in the light of changed circumstances."[17] The Court is the steward of our freedoms and has long recognized that what might have been a constitutionally permissible restraint in a time of political tension, may not, in a calmer time, meet the strict requirements of the First Amendment. Compare *Ex parte Endo*, 323 U. S. 283 with *Hirabayashi* v. *United States*, 320 U. S. 81.

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[15] See Kennan, *Polycentrism and Western Policy*, Foreign Affairs, Jan. 1964; Senator Fulbright's speech "Foreign Policy—Old Myths and New Realities," 110 Cong. Rec. 6227; Secretary of State Rusk's speech reported in Congressional Quarterly, March 6, 1964; *East-West Trade, A Compilation of Views of Businessmen, Bankers, and Academic Experts*, Senate Committee on Foreign Relations, 1964, pp. 220, 245, 273, 278, 284; *East-West Trade*, Hearings before the Senate Committee on Foreign Relations, 89th Cong., 1st Sess., Part II, Feb. 24, 25 and 26, 1965, pp. 26-31, 60-62, 116-69, 243-44, 248-50; *Report to the President of the Special Committee on U. S. Trade Relations with Eastern European Countries and the Soviet Union*, U. S. Govt. Printing Office, 1965, pp. 1-2.

[16] "It has become evident to most of us", an expert has recently written, "that the language and ideas of the cold war are no longer adequate as a guide to internal politics today." Shulman, *Beyond the Cold War* (New Haven 1965).

[17] Compare *Block* v. *Hirsh*, 256 U. S. 135 with *Chastleton* v. *Sinclair*, 264 U. S. 543, 547-8 and *Noble State Bank* v. *Haskell*, 219 U. S. 104 with *Abie State Bank* v. *Weaver*, 282 U. S. 765, 772; see also *Baker* v. *Carr*, 369 U. S. 186, 214.

It would be ironic indeed if conflict with Soviet Communism should serve as a reason for the dimming of democratic freedoms. For, whatever form that conflict may have assumed in the past, whatever threat it may have posed to our security as a Nation, the fact is that its terms have drastically changed. Today our most important weapon in this conflict is freedom, not repression.

VIII.

Rule XI is unconstitutional on its face by reason of its vagueness, generality and breadth.

Even if the interrogation of petitioner were constitutionally permissible under a narrowly drawn enactment, the conviction cannot stand because Rule XI is, on its face, an unconstitutional invasion of the First Amendment. And the change in circumstance which requires the Court to turn away from the constraints of the past which have justified impairment of political expression must receive full play in its scrutiny of the Rule for it clearly invades the protected freedoms.

The key jurisdictional term in the Rule is "propaganda." The Rule does not, either disjunctively or conjunctively, link propaganda with some other form of activity. If the subject matter of propaganda were subtracted from it, there would be nothing left. The only "remedial legislation" which the Committee is authorized to recommend is legislation relating to propaganda. The substantive evil is the content of printed matter, utterances and idea.[13] And,

[13] The Rule's concern with propaganda which seems so archaic today is the product of the First World War when this newly developed technique of influencing human actions was vigorously employed by the combatants to gain American support. It was feared as a sinister and coercive tool for transmitting pressure

no gloss, however ingenious, can convert the Rule into one dealing with conduct rather than speech, for to do so would be to attribute to Congress a disregard or ignorance of one of the most meaningful distinctions which our public law has produced. In order to exercise jurisdiction the Committee must inevitably label and classify those ideas which are "unAmerican," "subversive" or "attack the principle of the form of government as guaranteed by our Constitution."

The Rule thus authorizes the Committee officially to brand certain classes or forms of ideas and expressions. Such activity by the legislative branch of the government can only serve to censor free speech and political expression, for people are unwilling or afraid to advocate or even to listen to ideas which have been branded as disloyal by the government.

It is apparent that such an extraordinary departure from representative government as we have known it would have to be justified—if it could be justified at all—by the most meticulously defined limitations. Instead we find that the scope of this censorship system is vague and boundless.

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on behalf of unseen principals and endowed with an almost supernatural power. It was associated with foreign plots to undermine in illegitimate ways the democratically determined national interest. See Lasswell, *Propaganda*, XII Encyclopedia of the Social Sciences, 521-527.

The source of the Rule is Senate Resolution 439 which in 1919 extended the authority of the Overman Committee, then investigating German propaganda, to investigate:

"... any efforts being made to propagate in this country the principles of any party exercising our claiming to exercise authority in Russia, whether such efforts originate in this country or are incited or financed from abroad, and, further, to inquire into any effort to incite the overthrow of the Government of this country, or all efforts, by force or by the

A. The Applicable Standards.

Section 192, under which petitioner was indicted and convicted, punishes refusals to answer questions "pertinent to the question under inquiry" by a Committee of either House of Congress where the question under inquiry is within the power of the Committee to investigate. The witness must resolve for himself whether a question by the Committee is authorized and this he can only do by reference to the statute or resolution purporting to authorize the investigation. Therefore, the contempt statute must be read together with the authorization of the Committee, in order to decide whether the witness was able to make the determination that the inquiry was authorized with the accuracy required by the due process clause.

This composite statute provides no reasonably ascertainable standard of guilt and is too vague and indefinite to meet the standards of due process under the Fifth Amendment. As the Court has held,

> "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453. "Words which are vague and fluid . . . may be as much of a trap for the innocent as the ancient laws of Caligula." *United States* v. *Cardiff*, 344 U. S. 174, 176. "In the light of our decisions, it

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destruction of life or property, or the general cessation of industry."

The Fish Committee, created by House Resolution 220 in 1930, was charged with investigating not only "communist propaganda" but a wide range of conduct as well. The McCormack-Dickstein Committee was charged in 1934 (H. Res. 184) with investigating Nazi propaganda in a resolution which foreshadows the language of House Resolution 282 in 1938 and of Rule XI. The term "Un-American" was first introduced in the 1938 resolution.

appears upon a mere inspection that these general words and phrases are so vague and indefinite that any penalty prescribed for their violation constitutes a denial of due process of law. It is not the penalty itself that is invalid but the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all." *Champlin Refining Co.* v. *Corporation Commission of Oklahoma*, 286 U. S. 210, 243.

The sanction of the Rule is not merely the ultimate one of contempt. The vagueness of the Rule must be also assessed in terms of the "chilling effect" of its censorship-exposure sanctions. Compare *Dombrowski* v. *Pfister*, 380 U. S. 479, 492-494."

As the Court has frequently held, the First Amendment makes heavy demands for precision on statutes which impose restraints on speech, press and assembly. See *Baggett* v. *Bullitt*, 370 U. S. 360; *NAACP* v. *Button*, 371 U. S. 415; *Cramp* v. *Board of Public Instruction*, 368 U. S. 278;

" The vagueness issue raised here is quite different from that adjudicated in *Barenblatt*. The petitioner in that case presented this area only the question (Brief p. 4), "Whether Congress has authorized the House Committee on Un-American Activities to conduct by compulsory process as investigation in the field of education." On the basis of implicit House ratification of the Committee's past investigation of "Communist activities," the Court gave an affirmative answer to the question presented. It further found that "Communist activities" were a touchstone which validated as legislative the Committee's interrogation. *Barenblatt, supra*, at 123. But the intimidating effect of the Rule cannot be measured by the House's implicit approval of a narrowed scope for its application It can only be measured by the impact of the language of the Rule and of what the Committee has done with the Rule on the exercise of the protected freedoms. In addition, it would appear that the view that the "Committee is allowed, in essence, to define its own authority, to choose the direction and focus of its activities" (*Watkins, supra*, at 205) has received renewed validation from the Ku Klux Klan investigation. (See *infra* p. 114).

Winters v. *New York*, 333 U. S. 507, 509-510, 517-518; *Herndon* v. *Lowry*, 301 U. S. 242; *Stromberg* v. *California*, 283 U. S. 359; cf. *Sweezy* v. *New Hampshire*, 354 U. S. 234, 259.

In the *Cramp* case, *supra*, the Court said (at 287):

> "The vice of unconstitutional vagueness is further aggravated where, as here, the statute in question operates to inhibit the exercise of individual freedom affirmatively protected by the Constitution. As we said in *Smith* v. *California*, '* * * stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser.' 361 U. S. 147, at 151. . . ."

In *NAACP* v. *Button*, *supra*, the Court stated (at 432-433):

> "(I)n appraising a statute's inhibitory effect upon such rights, this Court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar. *Thornhill* v. *Alabama*, 310 U. S. 88, 97-98; *Winters* v. *New York*, (333 U. S. 507), 518-520. *Cf. Staub* v. *City of Baxley*, 355 U. S. 313 . . . . The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. *Cf. Marcus* v. *Search Warrant*, 367 U. S. 717, 733. These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter

their exercise almost as potently as the actual application of sanctions.

Cases such as *Dombrowski, Baggett* and *Sweezy* condemned the term "subversive" as excessively vague in statutes imposing restraints on the protected freedoms. And in *Dombrowski* and *Cramp* the Court dealt with the intimidating vagueness of statutory formulas such as a "Communist front organization" (*Dombrowski, supra* at 492-494) and giving "aid, advice, support or influence to the Communist Party" (*Cramp, supra* at 285) which are no different from the formulas used by the Committee to condemn individuals and organizations.

Moreover the Rule must be tested by the Court's requirement that restraints in the area of the First Amendment must be narrowly drawn. A statute may not in the pursuit of legitimate ends unnecessarily sacrifice the protected freedoms. *Aptheker* v. *Secretary of State,* 378 U. S. 500; *NAACP* v. *Button, supra; Louisiana ex rel. Gremillion* v. *NAACP,* 366 U. S. 293; *Talley* v. *California,* 362 U. S. 60; *Schware* v. *Board of Examiners,* 353 U. S. 232; *Martin* v. *City of Struthers,* 319 U. S. 141; *Cantwell* v. *Connecticut,* 310 U. S. 296; *Schneider* v. *State,* 308 U. S. 147.

The Rule is far too vague, and broad and general to satisfy the requirements of the First Amendment.

B. The Terms of the Resolution Are Inherently Vague.

In *Watkins, supra,* the Court said of the Rule (at 202):

> "It would be difficult to imagine a less explicit authorizing resolution which can define the meaning of 'un-American'. What is that single solitary 'principle of the form of government as guaranteed by our Constitution?'"

The key terms of the resolution are neither terms of art nor have they acquired a specialized or technical meaning or a meaning "by general acceptation." *Schechter Poultry Corporation* v. *United States*, 295 U. S. 495, 552. They are merely forms of political polemic, epithets of opprobrium used to attack the ideas or advocacy which are objectionable to the person who employs them.

The President's Advisory Committee on Universal Training responded to the contention that universal military training is "un-American:"

> "An epithet is not an argument. 'Un-American' means simply that it has not been done before in America. If Americans want it, it becomes American." [80]

In *Feinglass* v. *Reinecke*, 48 F. Supp. 438, 441 (D. C. Ill.), the court pointed out:

> "Any political idea that happens to conflict with the economic or political notions of an individual is apt by him to be deemed un-American."

The designation "un-American" implies that there are certain ideas and concepts that are "American." Whatever usefulness such a distinction may have as an appeal to patriotism, it is meaningless as a tool for classifying speech and ideas.[81]

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[80] *A Program for National Security*, Report of the President's Advisory Committee on Universal Training (1947), 39.

[81] In an editorial in the *New York Times* on January 5, 1945, the basic ambiguity of this term was thus commented on:

> "The Special Committee to Investigate Un-American Activities suffered from ambiguity at its birth. Just what is an un-American activity? The law defines crimes against the state,

Perhaps the most telling commentary on the difficulty of this term is its use by minority members of the committee to condemn the majority's interpretation of the resolution. Thus in the Committee's 1942 report, Congressman Voorhis complained:

> "Once * * * the committee undertakes to accuse people of un-American activities because they criticize certain features of our economy or say unkind things about finance capitalism or because they come out for a greater degree of cooperation in our economic life, it is in danger of becoming an agency which arrogates to itself the right to censor people's ideas. That in itself is un-American." [82]

Like the term "un-American", the term "subversive" is not a term of art, nor does it have an accepted common meaning, but is rather the language of political abuse or opprobrium. This term, which the Court used in quotation marks in *United States* v. *Lovett*, 328 U. S. 303, 308, is probably one of the most question-begging words yet devised. Nowhere in the resolution is the question answered, subversive of what? [83]

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and persons committing such crimes are admittedly un-American. But is it un-American to hold an unpopular opinion * * * or take an attitude that is also held or taken by the Communists? * * * Had he [Dies] pushed his opinion to its logical end more than half the population of the United States might have been denounced * * *. * * * he used methods that old-fashioned persons regard as un-American—indictment by innuendo, refusal of defense testimony, prosecution and sometimes persecution in place of impartial investigation."

[82] 77th Cong., 2d Sess., H. Rept. 2277, Part 2, 4.

[83] The Committee on Appropriations whose report was considered by the Court in *United States* v. *Lovett*, *supra*, sought to formulate

It has been well said that this term is a term of abuse customarily applied to activities "helpful or benevolent to wage earners, persons on relief, or those who are disadvantaged in the struggle for existence." [84]

Since the words "subversive" and "un-American" have no meaning beyond the prejudices of the speaker, we are left only with propaganda which "attacks the principle of the form of government as guaranteed by our Constitution." But this phrase suffers from comparable ambiguity. In *Schneiderman* v. *United States*, 320 U. S. 118, this Court was unable to identify the "principles of the Constitution" and refused to hold that "petitioner is not attached to the Constitution by reason of his possible belief in the creation of some form of world union of Soviet republics" (at 145). The Court suggested that if there is any indispensable principle of the Constitution, it is the guaranty of freedom of thought (at 138, 144), and stated (at 137, 138) that the Constitution itself refutes "the idea that attachment to any particular provision or provisions is essential, or that one who advocates radical changes is necessarily not attached to the Constitution."

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its own definition of "subversive activity" after conceding that the term had not theretofore been defined by Congress or by the courts. This definition states that, "Subversive activity in this country derives from conduct intentionally destructive of or inimical to the Government of the United States—that which seeks to undermine its institutions, or to distort its functions, or to impede its projects, or to lessen its efforts, the ultimate end being to overturn it all. Such activity may be open and direct as by effort to overthrow, or subtle and indirect as by sabotage." 78th Cong., 1st Sess., H. Rept. 448 (1943) 5.

[84] Emerson and Helfeld, *Loyalty among Government Employees*, 58 Yale L. J. 1, 40 (quoting Attorney General Jackson).

The Court of Appeals in *Barsky* v. *United States*, 167 F. 2d 241, 245, 246 (C. A. D. C.) cert. denied 334 U. S. 843, thus sought to give precision to this phrase: "The basic concept of the American system, both historically and philosophically, is that government is an instrumentality created by the people, who alone are the original possessors of rights and who alone have the power to create government. * * * The prime function of government, in the American concept, is to preserve and protect the rights of the people." Cf. *Schneiderman* v. *United States*, *supra*, at 181 (Chief Justice Stone's dissenting opinion). But this definition is so broad as to be meaningless.

As Judge Clark pointed out in his dissent in *United States* v. *Josephson*, 165 F. 2d 82, 96 (C. A. 2), cert. denied 333 U. S. 838:

> "And the clause as to attacking the principle of our form of government, as guaranteed by our Constitution, cannot be given any specific content. The freedom of amendment permitted by our Constitution makes possible advocacy of the most extensive changes in our governmental form. It cannot be that the advocacy of amendments urging change in the relation, for example, of the Executive and Congress, the subject recently of several popular books, is subversive."

The basic obscurity of the resolution is compounded by the assumption that there is some one principle of the Constitution. See *Watkins*, *supra*, at 202. Judge Edgerton, dissenting in the *Barsky* case, *supra*, at 262, commented on the difficulty of the expression:

> "Does 'the principle of the form of government' here mean the republican or democratic principle only, or

> does it include e.g. the constitutional duty of courts not to enforce unconstitutional legislation? This court puts a plural where Congress put a singular, and says 'the principles * * * are obvious.' To me it is not obvious how much Congress meant by 'the principle,' or how much the court means by 'the principles,' or that the two meanings are identical. Both because 'the principle' is vague and because 'attacks' is vague, I do not know whether propaganda 'attacks the principle' if, e.g., it advocates a constitutional amendment replacing the American principle of judicial review by the British principle of legislative supremacy."

The clearest "principle of the form of government as guaranteed by our Constitution" is freedom of thought and of political affiliation and expression; "if there is any principle of the Constitution that more imperatively calls for attachment than any other, it is the principle of free thought—not free thought for those who agree with us, but freedom for the thought that we hate," *United States* v. *Schwimmer*, 279 U. S. 644, 654, 655. As one of our most eminent historians has written:[88]

> "True loyalty may require, in fact, what appears to the naive to be disloyalty. It may require hostility to certain provisions of the Constitution itself, and historians have not concluded that those who subscribed to the 'Higher Law' were lacking in patriotism. We should not forget that our tradition is one of protest and revolt, and it is stultifying to celebrate the rebels of the past—Jefferson and Paine, Emerson and Thoreau—while we silence the rebels of the present.

[88] Commager, "Who is Loyal to America?" in *Primer of Intellectural Freedom* (1949), edited by Howard Mumford Jones, 30.

'We are a rebellious nation,' said Theodore Parker, known in his day as the Great American Preacher, and went on: 'Our whole history is treason; our blood was attainted before we were born; our creeds are infidelity to the mother church; our constitution, treason to our fatherland. What of that? Though all the governors in the world bid us commit treason against man, and set the example, let us never submit.'" [88]

Surely there is nothing more truly "un-American" or more hostile to the "principle of the form of government as guaranteed by our Constitution" than the attempt by a governmental body to compel conformity. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein." *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624, 642. See, also, Jackson, J., concurring in *Thomas* v. *Collins*, 323 U. S. 516, 545.

The legislative background of the term "un-American" in no way serves to sharpen its meaning. Thus, when the House passed Resolution 282 in 1938, members unsuccessfully demanded the insertion of controlling or limiting standards with respect to the meaning of the term "un-American":

"Mr. Patrick. It seems to me the most important thing involved in this matter is what is an un-American and what is an American activity? Who is to pass on that question?

[88] Compare the concurring opinion of Justice Jackson in *American Communications Association* v. *Douds*, 339 U. S. 382, 440, footnote 12.

"Some things have been mentioned that perhaps we would concede to be un-American. But what is un-Americanism?

"* * * what will determine when anything is un-American so that we can put a finger on it and say that is it?

"Mr. Taylor. The Congress will finally prescribe that.

* * * * * * *

"Mr. Maverick. Nobody knows what is un-American. I ask you what is un-American?

"Mr. Knutson. The goose-step." [87]

In 1940, during the debate on the re-enactment of the basic resolution (86 C. R. 570-604), the members of the committee expressed conflicting views on the meaning of the term "un-American." [88]

The lack of meaning of the term "subversive" was complained of by Representative Outland in 1943:

"Just what are subversive activities? Who is to be the judge? There have been people who have called the chairman of the committee subversive, which in my

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[87] 83 C. R. 7572, 7576 (1938). In the course of a debate on a prior resolution along similar lines the proponents refused to indicate its meaning when Representative Johnson asked:

"What I would like to find out is what is un-American."

H. Res. 88, 75th Cong., 1st Sess., 81 C. R. 3286 (1937).

In answer to a prior similar question, the member in charge of the resolution stated:

"The committee may read this resolution and put whatever interpretation they see fit upon it without any limitation so far as I am concerned" (81 C. R. 3285).

The resolution failed to pass.

[88] One member of the committee defined un-American activities as "organizations and groups * * * which are directed, controlled and subsidized by foreign agencies or governments" (86 C. R. 576).

opinion is entirely incorrect. But the permitting of individual interpretation of just what is deemed subversive is a dangerous and un-American thing." [90]

This question was asked after almost five years of investigation and committee reports. No answer to it is recorded.

The Committee recognizes no meaningful limitations at all on the permissible range of its activities. Thus, when Representative Wood was chairman of the Committee he stated at one of its hearings, "The committee is empowered to investigate any activities of any organization or any individual. The committee conceives it to be within its scope to investigate the activities of any organization that expounds American (sic) principles of government." [90]

In the same vein are the statements of Representative Jackson:

> "I regard anything as a proper subject for investigation and interrogation by this committee which has affiliated with it a considerable number of individuals who are either themselves members of the Communist Party or who have for many years followed the Communist Party line.
>
> • • • • •
>
> Is there any phase of life in this country which is not subject to the propaganda activities of the Communist Party?" [91]

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[90] 89 Cong. Rec. 806 (1943).

[90] *Communist Party* (1945) 31.

[91] *Los Angeles Area* (1953) 619, 645.

C. The Committee's Consistent Interpretation of the Resolution Establishes Its Unconstitutionality.

The Committee has condemned as "un-American," or "subversive" criticism of individual members of Congress, of the FBI, and espousal of liberal legislative programs,[92] belief in the extension of universal suffrage and the raising of wages and the standard of living;[93] signing a letter in behalf of Harry Bridges and speaking favorably of sit-down strikes;[94] advocacy of anti-poll tax legislation, activity on behalf of the Scottsboro defendants and support of the Morgenthau plan for Germany;[95] and criticism of the McCarran-Walter Immigration Act.[96]

In recent years the Committee has condemned criticisms of blacklisting (Hearings, 1956)[97] the American cultural exchange program (Hearings, 1959),[98] lawyers who have opposed the Committee (1959)[99] the National Council of

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[92] Ogden, *The Dies Committee* (1945) 236-237; *New York Times*, Feb. 23, 1941; *3 Motion Picture Industry* (1951) 669; 77th Cong. 2d Sess., H. Rept. 2277 (1942), 2; *2 Communism in the Government* (1950) 2959-2985, testimony of Max Lowenthal (the subpoenaing of Lowenthal in these hearings was considered an attempt to discredit an individual solely because he had written a work critical of the FBI, see Carr, *House Committee on Un-American Activities* (1952) 202-203); *Infiltration-Education* (1953) 1088-1089.

[93] *Investigation of Un-American Propaganda Activities* (Exec.) 1299-1300.

[94] 78th Cong. 2d Sess., H. Rept. 1311, *Report on the CIO Political Action Committee* (1944), 82.

[95] 80th Cong. 1st Sess., H. Rept. 592, Report on the Southern Conference for Human Welfare (1947), 4, 10.

[96] *G. Bromley Oxnam*, 116-117.

[97] *Fund For the Republic*, Parts 1, 2 and 3 (1956).

[98] *American National Art Exhibition in Moscow*, July 1, 1959.

[99] *Communist Legal Subversion*, H. Rep. No. 41, February 16, 1959.

Churches and liberal christianity (Hearings, 1960)[100] the scholarship program of the National Science Foundation (*Annual Report*, 1961, p. 93), the movement to check or abolish the Committee itself (1962)[101] the peace movement and the Women Strike For Peace (Hearings, 1962)[102]

The Committee's efforts to give shape to its jurisdiction are not reassuring. In one of its early reports, the Committee made an attempt to comment on the meaning of the term "un-American" and emphasized that "Americanism recognizes the existence of a God and the all important fact that the fundamental rights of man are derived from God and not from any other source." This report suggests that the following *inter alia* are Communist and therefore "un-American": "absolute social and racial equality"; "the destruction of private property and the abolition of inheritance" (apparently irrespective of the means employed or advocated); "the substitution of communal ownership of property for private ownership"; belief that it is "the duty of government to support the people"; "a system of political, economic, or social regimentation based upon a planned economy"; "collectivistic philosophy"; and "the de-

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[100] *Air Reserve Center Training Manual*, February 25, 1960.

[101] The Committee devotes not inconsiderable energy to defending itself and attacking its enemies as subversive. See:

"Operation Abolition," H. Rept. 2228 (86th Cong. 2nd Sess.) (a film);

The Truth About Operation Abolition, H. Repts. 1278, Parts 1 and 2 (87th Cong. 2nd Sess.);

Manipulation of Public Opinion, H. Rept. 1282, Parts 1 and 2 (87th Cong. 2nd Sess.);

Hearings, The Communist Party's Cold War Against Congressional Investigation, October 10, 1962.

See also *Barenblatt, supra*, note 33 (dissenting opinion).

[102] *Communist Activities in the Peace Movement* (1962).

struction of the American system of checks and balances with its three independent coordinate branches of government." [103]

In its 1940 report, the Committee set forth the following definition of "un-American":

> "By un-American activities we mean organizations or groups existing in the United States which are directed, controlled or subsidized by foreign governments or agencies and which seek to change the policies and form of government of the United States in accordance with the wishes of such foreign governments." [104]

On July 18, 1946, the chief counsel of the Committee wrote Congressman Doyle: "The committee has adopted no definition of subversive or un-American activities." [105] Mr. Doyle commented:

> "Ever since I became a member of this Seventy-ninth Congress, I have sought to ascertain by what definition of 'subversive activity' or 'un-American activity' a person was to be measured as either a loyal or disloyal American citizen. No one seemed to find any high court definition used by the House Committee nor could I find any printed or any announced definition which the committee had to either guide or limit its activities.
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> * * * * *
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> "This illustrates that there can be at present as many definitions of 'subversive and un-American' as

[103] 76th Cong., 1st Sess., H. Rept. 2 (1939), 10, 12.

[104] 76th Cong., 3d Sess., H. Rept. 1476 (1940), 2.

[105] 92 C. R. A4743 (1946).

there are committee members. In fact, I think I notice that there is some sharp difference of opinion expressed by committee members on this point." [106]

In 1945, the Committee found it necessary to farm out the resolution to the Brookings Institution for interpretation.[107] In 1954, in its informational pamphlet "This Is YOUR House Committee on Un-American Activities" the Committee defined (at p. 2) "un-American or subversive activity" [108] as, "That activity which attacks the principle of the form of government as guaranteed by our Constitution is un-American and subversive by seeking to overthrow it by use of force and violence, in violation of established law." Yet under the heading "Subversive Activities" in the pamphlet containing the above definition, the Committee went far beyond the overthrow of the government by force and violence and dealt with "Communist fronts" (p. 21); Fascists or "hate" groups (p. 21); "fellow-travelers" (p. 24); teachers who claim the Fifth Amendment (p. 23); etc. In 1958 when the pamphlet was superseded by "The House Committee on Un-American Activities, What It Is—What It Does" (86th Cong. 1st Sess.) the old definition was dropped and no new one substituted.

In 1961, the then Chairman of the Committee defined "un-American" as "any activity that strikes at the basic concept of our Republic" but denied that the Committee had juris-

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[106] *Ibid.*

[107] *Suggested Standards For Determining Un-American Activities*, The Brookings Institution (Washington, 1945).

[108] On the disappearance of the word "propaganda" see, *infra*.

diction over the Ku Klux Klan.[109] In 1965, after long hesitation, the Committee decided to undertake an investigation of the Klan[110] and based its authority on the 1945 Brookings Institution study, *supra*, which, in the intervening twenty years had never been used by the Committee as a guide to its jurisdiction.[111]

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[109] In a telecast ("Youth Wants to Know") on January 28, 1961, Representative Walter gave an interrogator the following account of the limitations on the Committee's jurisdiction:

"Question: Sir, for our own information, could you tell us just what is considered un-American, by your Committee?

"Representative Walter: Well, any activity that strikes at the basic concept of our Republic.

"Question: Sir, don't you agree that such subversive organizations as the American Nazi Party and Ku Klux Klan constitute a threat to the liberties of Americans?

"Representative Walter: I don't think so. Actually, they haven't engaged in any activity on behalf of a foreign power and that, of course, is the big difference.

"Question: But, sir, don't you believe that the suppression of minorities is against the Constitution of the United States?

"Representative Walter: Of course, it is, but it is not within the jurisdiction of the Committee on Un-American Activities to make inquiries into that field. Our inquiries are limited by the statute creating the Committee, and this, of course, is Communism and Communist activity."

[110] The investigation of the Ku Klux Klan was demanded by the Committee member Weltner on February 1, 1965. See 111 Cong. Rec. 1592, Feb. 1, 1965 (Daily Edition). On March 30th, 1965, after a prolonged preliminary probe, an investigation of the Klan was approved by the Committee. The debate on the resolution authorizing the investigation appears at 111 Cong. Rec., pp. 7740, 7750, April 14, 1965 (Daily Edition). See, also, *New York Times*, March 31, 1965; March 29th, 1965; February 26, 1965.

[111] See 110 Cong. Rec. 7745, April 14, 1965 (Daily Edition). The reasons for the Committee's failure to use the Brookings definition of "un-American" are hardly inscrutable. It states that it is "un-American for any individual or group by force, intimidation, deceit, fraud or bribery, to prevent or seek to prevent any person from exercising any right or privilege which cannot constitutionally be denied to him either by the Federal Government or by a State government." The Committee has been historically reluctant to identify its jurisdiction with constitutional protection for that would undermine its entire *raison d'etre*.

The Committee stretches the resolution to its widest scope in attacking organizations. The Committee regards certain organizations and movements as "subversive" because of their alleged domination by the Communist Party, because they entertain particular objectives which Communists also entertain, because they have never been aggressively anti-Communist, because their officers, sponsors or members have been exposed by the Committee as "subversive," [112] or because some other committee or officer of government has "cited" [113] them as "subversive" organizations. The Committee has devised an elaborate terminology of organizational condemnation: "Communist-dominated," "Communist front," "Communist satellite," "Communist transmission belt," "arm of the Communist Party," "formed to advance Communist aims." [114]

The Committee attacks organizations in four interrelated ways. First, some of its reports deal exclusively with organizations; for example, in 1944 it issued a report exposing the CIO Political Action Committee (78th Cong., 2d Sess., H. Rept. 1311); in 1947 it issued reports, among others, on the Southern Conference for Human Welfare (80th Cong., 1st Sess., H. Rept. 592) and on the Civil Rights Congress (80th Cong. 1st Sess., H. Rept. 1115); in 1949, it issued a "Review of the Scientific and Cultural Conference for World Peace;" in 1950, the organizations reported

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[112] This exposure in turn frequently rests upon the individual's relationship to other organizations deemed by the Committee to be "subversive."

[113] The counterpart in the organizational field of "exposure."

[114] The standards employed by the Committee in thus condemning organizations are analyzed in Gellhorn, *Report on a Report of the House Committee on un-American Activities*, 60 Harvard L. R. 1193.

on included the National Lawyers Guild, the National Committee to Defeat the Mundt Bill, and the *Honolulu Record*; and in 1952, it issued, among other attacks on organizations, a "Review of the Methodist Federation for Social Action."

Second, in the course of its hearings the Committee questions the witness concerning his relationship with particular organizations. It then puts into the record its own charges concerning the organization and its "subversive" nature.

Third, in its annual reports, the Committee singles out particular organizations or causes and denounces them as subversive.

Fourth, as a separate project, the Committee has its own listing of organizations. This *Burke's Peerage* of organizational "subversion" is not a report on legislation or a legislative subject matter. It is not a report to Congress at all. The 1957 *Guide to Subversive Organizations and Publications* (82d Cong., 1st Sess., H. 137), lists in alphabetical order some 639 organizations and 204 publications and identifies the government agencies which have cited them adversely. A striking characteristic of the list is the fact that many of the citations turn out to be by the Committee itself, or by state committees of the same character. Among the organizations cited are Almanac Singers; Allied Voters against Coudert (a New York organization cited "as a Communist front" by the California Committee on Un-American Activities); American Committee for Anti-Nazi Literature (cited by California committee); American Committee of Liberals for the Freedom of Mooney and Billings; American Council, Institute of Pacific Relations (in response to this organization's request for the deletion of its name, the committee states that the characterization "will continue

pending the result of * * * investigations" by the California committee and a United States Senate committee); American Friends of Spanish Democracy; American Investors Union, Inc. (of "Communist complexion"); American Labor Party; American Round Table on India; American Relief Ship for Spain (cited by the committee itself as having "raised funds for the Communist end of that civil war"); Associated Magazine Contributors; Book Find Club; Citizens Committee to Aid Locked-out Hearst Employees; Committee for Civil Rights for Communists; Committee for Peaceful Alternatives to the Atlantic Pact; Committee to Defend Angelo Herndon; Connecticut State Youth Conference; Federated Press; Freedom from Fear Committee; Illinois People's Conference for Legislative Action; International Congress of Women; Jewish Black Book Committee of Los Angeles; League Against Yellow Journalism; League for Protection of Minority Rights; League of Women Shoppers; Methodist Federation for Social Service (cited by the California committee as having admitted "cooperation with * * * the Communists"); National Committee to Aid the Victims of German Fascism; National Committee to Defeat the Mundt Bill (cited from the committee's report on the organization, *supra*, as a group "which has carried out the objectives of the Communist Party in its fight against anti-subversive legislation"); National Lawyers Guild; National People's Committee Against Hearst; Milk Consumers Protective Committee; Joint Committee of Trade Unions on Social Work; Non-Partisan Committee for the Re-election of Vito Marcantonio; Progressive Citizens of America; Scottsboro Defense Committee; Sleepy Lagoon Defense Committee; Southern Conference for Human Welfare (cited by the committee because it "received money from the Robert

Marshall Foundation, one of the principal sources of funds by which many Communist fronts operate"); Sweethearts of Servicemen (cited by the committee because "its maiden effort was a delegation of seventy-five young women who arrived in Washington to petition Congress 'to give their soldier boy friends and husbands the chance to vote in the 1944 Presidential elections' "); Teen-age Art Club; Washington (D. C.) CIO Committee to Reinstate Helen Miller; and Young People's Records. Among the publications listed as subversive are: *Allied Labor News Service, California Eagle, Chicago Star, China Aid News, Friday, Guild Lawyer, Honolulu Record, IJA Monthly Bulletin, In Fact, Labor Herald* (of the California CIO); *Lawyers Guild Review; Reader's Scope.*

The 1957 edition of the Guide was superseded by a revision in 1961. The new edition contained the names of 200 more organizations and 25 additional publications considered to be "subversive."

D. Conclusion.

From what has been said with respect to the indefiniteness of the resolution it seems incontrovertible that the resolution is unconstitutional. The resolution is not only hopelessly vague, but it would be difficult to find a more glaring example of over-regulation.

In none of the above cited cases (*supra*, pp. 99, 101) did the statute authorize or make possible the far-reaching abridgments of constitutionally protected rights which this resolution authorizes. In none of them was there presented the same combination of vagueness and extreme over-regulation. Professor Paul A. Freund has written:

"The problem of an overbroad statute, whether in the field of civil liberties or elsewhere, is really a special case of the problem of vagueness. A statute which is vague and indefinite—which prohibits, for example, 'unreasonable prices'—is of course insupportable unless what is indefinite is made definite in advance by authoritative construction. Essentially the same vice inheres in a statute that is overbroad. The terms themselves are not vague; a ban on all picketing is superficially precise. Yet the clarity of its language is delusive, since it will have to be recast in order to separate the constitutional from the unconstitutional applications. If it is read as applicable only where constitutionally so, the reading uncovers the vagueness which is latent in its terms.

"* * * The public interest in freedom of expression may serve to invalidate an overbroad statute that casts a cloud on expression both within and without the constitutional boundary.

"Can an overbroad statute be saved by construction? If the limiting construction is a relatively simple and natural one it can probably be made to save the statute." [115]

Certainly a limiting construction of the resolution would not be "a relatively simple and natural one." In any event, it is no longer a question of separating constitutionally permissible regulation of "propaganda" and "propaganda activities" from the constitutionally forbidden. The Committee has entirely abandoned the "propaganda" aspects of

[115] *The Supreme Court and Civil Liberties*, 4 Vanderbilt L. Rev. 533, 540 (1951).

the resolution (see, for example, R. 1) in favor of the policing of a wide range of political expression and association[116] which it was the key purpose of the First Amendment to safeguard against governmental invasion.

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[116] The word "propaganda" is never referred to by the Committee as its jurisdictional touchstone. Not only has the Committee rewritten its resolution but it insists that its rewritten version is correct. Congressman Doyle indicates the Committee's view as follows:

> "• • • that law [Public Law 601] tells us to come to California and other cities all over the United States to make inquiry into subversive and un-American activities and communistic propaganda."
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> *Los Angeles Area* (1953), 680.
>
> "Mr. Doyle: Our duty is to uncover subversive activities, wherever they are.
>
> Miss Epstein: Propaganda activities.
>
> Mr. Doyle: The word 'propaganda' I think is not in the text.
>
> • • • • •
>
> Mr. Doyle: I am directing your attention now to our direction that we investigate subversive activities.
>
> • • • • •
>
> Mr. Doyle: • • • What I am calling your attention to is this: You would expect us to investigate, therefore, under Point 2 [Public Law 601], subversive activities, wherever we find them, wouldn't you?
>
> Miss Epstein: Subversive propaganda activities • • •.
>
> • • • • •
>
> Mr. Doyle: • • • We feel that the Communist Party • • • have been or are participating in subversive activities.
>
> Miss Epstein: Propaganda.
>
> Mr. Doyle: And propagandizing subversive activities. • • •
>
> • • • • •
>
> • • • we are asking about subversives wherever it exists.
>
> • • • • •
>
> Mr. Moulder: Do you have any knowledge concerning communistic or subversive activities whatsoever?
>
> Miss Epstein: Are you talking about propaganda activities?
>
> Mr. Moulder: Either one.
>
> Miss Epstein: If you are talking about activities, I consider it outside of the scope of your inquiry. If you are talk-

IX.

Petitioner was not advised of the subject under inquiry or the pertinency of the individual questions.

Petitioner was denied an explanation of the matter under inquiry and the pertinency of the questions thereto as required by *Watkins* v. *United States*, 354 U. S. 178, 208-209,

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ing about propaganda activities, I will stand on the Fifth Amendment. * * *"

Los Angeles Professional Groups (1953) 3926-3929.

"Mr. Doyle: * * * Under Public Law 601, the United States Congress by unanimous vote assigned each and every member of this committee * * * the obligation of investigating the extent and character and objects of subversive and un-American propaganda and activities in the United States.

* * * * *

Mr. Doyle: * * * You do not consider that because a man is a member of the bar he should not be questioned factually about subversive activities in the United States * * *?"

Ibid., 3937-3938.

"Mr. Doyle: * * * we are assigned to this sort of a hearing today in order to investigate the dissemination within the United States of anything that is subversive or un-American. * * * And our definite understanding is to investigate subversive and un-American conduct within our country. That is the law."

One must return to the model for the current Rule, the McCormack-Dickstein resolution, to recognize what an enormous distance the Committee has travelled from its intended scope and purpose and what a shambles it has made of its mandate. The McCormack-Dickstein resolution, *supra*, note 78, was unmistakably an investigation into foreign propaganda *and nothing more*. See 78 Cong. Rec. 4946 (Congressman Dickstein's statement of purpose); 78 Cong. Rec. 4934, 4937, 4938, 4940, 4944, 4945. The report of the committee (H. Rep. No. 153, 74th Cong., 1st Sess.) ultimately resulted in the passage of the Foreign Agents Registration Act, P. L. 583, 75th Cong. 3rd Sess., 52 Stat. 631.

Not only has the subject of the Rule been altered but its predicate has as well. While the Committee "make(s) from time to time investigations," it devotes a large part of its budget to the dissemination of its own propaganda and not investigating anything.

214-215. See also *Scull* v. *Virginia*, 359 U. S. 344, 353. The trial court rested its conclusion on the claim that the announcement by the subcommittee chairman of the purposes of the hearing communicated the subject matter of the hearing to petitioner (R. 111). But there is no showing at all in the record that petitioner was present when the announcement was made. It is true his counsel was also counsel for the first witness, but we think that the *Watkins* rule requires that the subject matter of the hearing and its pertinency be communicated to the witness and not to his counsel.

Petitioner's objections to the jurisdiction of the Committee hardly showed that he was aware of the Committee's purpose to question him as it did. Compare *Barenblatt, supra*, at 123. On the contrary, the objections assumed that the purpose of the Committee would follow the lines of the Chairman's announcement: to expose petitioner and to break the Union. Under these circumstances it cannot be said that the objections reflected an awareness of a contemplated subject under inquiry. In such an "inquiry" all questions are pertinent if only they are sufficiently embarrassing, if only they serve to harass and expose the witness and his associates. But "pertinent" means "pertinent to a subject matter properly under inquiry, not generally pertinent to the person under interrogation." *Rumely* v. *United States*, 197 F. 2d 166, 177 (App. D. C.); *United States* v. *Orman*, 207 F. 2d 148, 153 (C. A. 3).

It is equally fallacious to argue that the objections filed by petitioner did not impose a requirement on the Committee to explain the subject under inquiry and the "connective reasoning whereby the precise questions asked relate to it." See *Watkins* v. *United States, supra.*

The objections filed by petitioner obviously constituted an objection to *all* of the questions which might be asked on the ground that they were pertinent only to an illegal subject matter, namely, the exposure of himself and his union. Under these circumstances, it seems to us that the Committee was obliged to make clear to petitioner, both the nature of the subject matter under inquiry and the connective reasoning which made the questions pertinent. The Committee itself thought that petitioner's objections called for some response from it when they were filed. Although the Committee remained silent until all the questions had been asked which were in issue here, it ultimately dismissed the objections *"nunc pro tunc"* (*supra*, pp. 11-12). Obviously this retroactive rejection was inadequate to give petitioner notice either at the time his objections were filed or when the questions in issue were asked that the Committee thought the subject of the inquiry—a proper legislative subject—had been adequately communicated to him.

X.

Petitioner's objections were not timely overruled and he was not directed to answer.

Petitioner's motion (*supra*, pp. 10-11) sought to bring to the attention of the Committee facts relating to the announced purpose of the hearing in support of the contentions that (a) the Committee was not a competent tribunal in that it was seeking to exercise non-legislative powers; (b) it lacked jurisdiction; (c) its announced purposes were unauthorized by its basic resolution, and (d) the interrogation which the Chairman had announced it would undertake was barred by the First Amendment.

The Chairman's response to the filing of the motion was non-committal and it was rejected at the close of the questioning *"nunc pro tunc"* (*supra*, pp. 11-12).

When petitioner was sworn he attempted to state orally the gist of the objections filed in the motion (R. 241) but was interrupted by the Chairman who told him that he was not permitted to "make an opening statement preceding the testimony you are about to give." The witness continued to try to get into the record the grounds of his objections, but was again charged with violating the rules of the Committee. He stated he was merely seeking to explain his position (*ibid.*). Again he was told that he could not state his objections prior to his interrogation (R. 242). When the witness made a fourth attempt to present to the Committee the substance of the objections contained in the motion he was interrupted by the Chairman and told that his conduct was "not tolerated by the committee" (*ibid.*).

After answering a few preliminary questions, the witness tried for a fifth time to present to the Committee the objections which had been presented in the motion (R. 242): "Before I answer that question I want to explain that this is not a legislative investigation for a bona fide legislative purpose." But he was again rebuked for violating Rule IX of the Committee's rules which requires that copies of prepared or written statements be filed in advance with the Counsel of the Committee (*ibid.*)

Thereafter the witness repeatedly sought to place in the record, in explaining the grounds for his refusal to answer questions, some of the objections which had been advanced in the motion. However, he was systematically interrupted by the Committee members who prevented him from com-

pleting his objections (R. 254, 255, 263, 268, 296) and who were concerned only with establishing, for purposes of perfecting a contempt case,[117] that the witness had not pleaded the Fifth Amendment (*ibid.*).

The subcommittee was required to overrule petitioner's objections, as stated in his motion, prior to the time he was forced to give testimony and to apprise him that it had overruled these objections, and to require him to proceed. *Quinn* v. *United States*, 349 U. S. 155; *Emspak* v. *United States*, 349 U. S. 190; *Bart* v. *United States*, 349 U. S. 219; and *Flaxer* v. *United States*, 358 U. S. 147.

The objections were manifestly not frivolous; they were presented in documented fashion and called for some response by the Committee. Not only did the Committee fail to overrule the objections in the motion, but it prevented the witness from presenting them orally (*supra*).

Nor did the Committee's direction to answer specific questions adequately discharge its responsibility, as defined by this Court. The Committee had made it clear (as in the *Bart* case, *supra* at 233), that it had no intention of ruling on the objections in the motion and petitioner had no way of knowing whether these grounds for his refusal had been considered and rejected. Besides, objections made by the witness to specific questions here were not co-extensive with the grounds urged in the motion. Since the subcommittee was required to communicate to the witness its response to *all* of his objections the fact that it directed him to answer after hearing some of them is no defense to our contention.

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[117] At the close of petitioner's testimony, the subcommittee voted to recommend that petitioner be cited for contempt (R. 380).

Thus, of the six grounds presented in the motion, only two were urged in response to the Count 1 question (R. 269-270); two, in response to the Count 2 question (R. 287-289); one to the Count 3 question (R. 284); one to the Count 4 question (R. 341-342); one to the Count 5 question (R. 362); and "for the reasons previously stated" to the Count 6 question (R. 366).

As the court below noted, this is a "serious question" (R. 420) and it warrants reversal.[118]

CONCLUSION

For the foregoing reasons, it is prayed that the judgment of conviction should be reversed.

Respectfully submitted,

EDWARD J. ENNIS
OSMOND K. FRAENKEL
MELVIN L. WULF
c/o American Civil Liberties Union
156 Fifth Avenue
New York, N. Y. 10010

FRANK J. DONNER
36 West 44th Street
New York, N. Y. 10036

DAVID REIN
711 Fourteenth Street, N.W.
Washington, D. C. 20005

Attorneys for Petitioner

[118] The issue was suggested on the appeal but not explicitly raised until the petition for rehearing was filed. Compare *Silber* v. *United States*, 370 U. S. 717.

APPENDIX

Constitutional and Statutory Provisions and Rules Involved

The First Amendment to the Constitution of the United States provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fifth Amendment to the Constitution of the United States provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law, nor shall private property be taken for public use, without just compensation."

The Sixth Amendment provides:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the prosecution; * * *"

2 U. S. C. Sec. 192, R. S. 102 (52 Stat. 942), as amended, provides:

> "Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee, established by a joint or concurrent resolution of the two Houses of Congress, wilfully makes default, or who having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months."

Public Law 601, Section 121, 79th Congress, 2d Session (60 Stat. 812, 823, 828) and House Resolution 5 (84th Congress) provide in pertinent part:

> "(b) Rule XI of the Rules of the House of Representatives is amended to read as follows:
>
> "RULE XI
>
> "Power & Duties of Committees
>
> "(1) All proposed legislation, messages, petitions, memorials, and other matters related to the subjects listed under the standing committees named below shall be referred to such committees respectively. . . .
>
> • • • • •
>
> "(q) (1) Committee on Un-American Activities.
>
> "(A) Un-American Activities.

"(2) The Committee on Un-American Activities, as a whole or by subcommittees, is authorized to make from time to time investigations of (i) the extent, character, and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation."

Rule 7 (c) F. R. Cr. Proc. provides in pertinent part as follows:

"The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count."

Rule I of the Rules of Procedure of the House Committee on Un-American Activities provides in pertinent part:

"No major investigation shall be initiated without approval of a majority of the Committee."